United States Court of Appeals

for the Second Circuit

APPENDIX

75-7300

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit



AMOCO SHIPPING COMPANY,

Plaintiff-Appellant,

vs.

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc, *in rem,*

Defendants-Appellees.

JOINT APPENDIX

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff-Appellant
One State Street Plaza
New York, New York 10004
DI 4-6800

KIRLIN CAMPBELL & KEATING
Attorneys for Defendants-Appellees
120 Broadway
New York, New York 10005
732-5520

(8463)

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RELEVANT DOCKET ENTRIES JA1

CIVIL DOCKET

UNITED STATES DISTRICT COURT

74 CIV. 223

Jury demand date:

JUDGE [illegible]KEL

D. C. Form No. 106 Rev

TITLE OF CASE	ATTORNEYS
AMOCO SHIPPING COMPANY vs. [illegible] OIL / SHIPPING COMPANY AND m/t ESSO CONNECTICUT, her engines, tackle, etc. in rem.	For [illegible]: HAIGHT, GARDNER, POOR & HAVENS ONE STATE STREET PLAZA, N.Y.C. N.Y. 10004 DI 4-6800 FILE COPY HAIGHT, GARDNER, POOR & HAVENS ONE STATE STREET PLAZA NEW YORK 6/19/75 ENTERED R BY: DXP For defendant: KIRLIN CAMPBELL & KEATING 120 Broadway- NYC 10005 (732-5520)

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	1/14/74	Hamilton	15-	
		1/16/74	[illegible]		15-
J.S. 6 mailed	Marshal	5/14/75	Daughtry	5-	
		5/15/75	Deas		5-
Basis of Action: COLLISION OF VESSELS	Docket fee				
	Witness fees				
Action arose at:	Depositions				

74 CIV. 223

Relevant Docket Entries

DATE	PROCEEDINGS	Date Order or Judgment Noted
1-74	Filed Complaint. Issued Summons.	
22-74	Filed summons and return-served HUMBLE OIL & REFINING CO. by Norman Freeman on 1-12-74.	
14-74	Filed ANSWER and counterclaim of deft. Exxon Company, U.S.A., a Division of Exxon Corp., sued herein as Humble Oil & Refining Co.	KC&K
14-74	Filed deft's notice of taking deposition of pltff., etc. on 4-13-74.	
15-74	Filed consent and order extending defts' time to answer to 3-6-74. So ordered- FRANKEL, J.	
6-74	Filed REPLY to counterclaim	HQP&H
30-74	Filed ANSWER of deft. Exxon Company, U.S.A., a Division of Exxon Corp., sued herein as Humble Oil & Refining Co.	KC&K
29-74	Pre-trial conference held- Goettel, U.S. Mag.	
3-74	Filed pre-trial schedule order as indicated. Goettel, U.S. Magistrate (m/n)	
4-74	Filed pltff's affdvt. of Hollis M. Walker, Jr. and notice of motion for an order to amend the complaint.	
4-74	Filed Memorandum of law in support of pltff's motion to amend the complaint, pursuant to Rule 15 (a) FRCP	
4-74	Filed memo endorsed on motion filed 9-4-74. The within motion to amend the complaint is granted upon the consent of the deft. So ordered- FRANKEL, J. (m/n)	
4-74	Filed amended complaint.	
11-74	Filed pltffs request for admission under Rule 36, requesting Humble Oil & Refinery within (30) thirty daysafter service of this request etc. as indicated.	
-74	Filed pltff reply to counterclaim contained in the defts answer to amended complaint.	
-74	Filed deft Exxon Corp. requests for pltff to produce and permit to inspect and copy all documents indicated.	
6-74	Filed answer to pltffs request for admission. (defts)	
-74	Filed Interrogatories of deft Exxon Co. to the pltff.	
7-74	Filed pltff's request for the production of documents.	
6-74	Filed defts' answer to request for production of documents.	
6-74	Filed defts' answers to interrogs.	
-74	Filed pltff's answers to interrogs.	
-74	PRE-TRIAL CONFERENCE HELD BY Goettel, U.S. MAG.	
5-74	Filed consent and pre-trial order. So ordered- FRANKEL, J.	
11-74	PRE-TRIAL CONFERENCE HELD BY Goettel, U.S. MAG.	
20-74	Filed pltff's pre-trial memorandum supplementing the pre-trial order.	
26-74	Filed deft. Humble Oil & Refining Co.'s proposed conclusions of law.	
26-74	Filed deft. Humble Oil & Refining Co's proposed findings of fact.	
8-75	Filed pltff's proposed findings of fact and conclusions of law.	
8-75	Filed Memorandum for Counsel- the trial of this case will begin at 10 a.m. on 1-21-75, in courtroom 102. Proposed findings and conclusions together with trial memoranda should be served and filed before the close of business on 1-16-75. It is so ordered- FRANKEL, J. (m/n)	
8-75	Filed pltff's affdvt. of Richard A. Corwin	
9-75	Filed Memorandum Decision Opinion # 41627- for the reason stated, the trial will commence as heretofore ordered at 10 a.m. on 1-21-75, in Courtroom 102. So ordered- FRANKEL, J. (m/n)	
15-75	Filed pltff's affdvt. of Joseph T. Stearns to supplement the affdvt of Richard A. Corwin dated 1-8-75.	
-75	Filed Trial Memorandum of defts on liability and damages.	
-75	Filed defts pre trial memorandum supplementing the pre trial order.	
10-75	Before FRANKEL, J. non-Jury trial begun.	
11-75	trial cont'd and concluded. Judge's decision-reserved.	

4 CIV. 223--- AMOCO SHIPPING CO.-vs- HUMBLE [illegible]

(FRANKEL, J.

DATE	PROCEEDINGS
Feb. 13-75	Filed memo endorsed on unsigned order to show cause. This motion is an effort to revive a question twice ruled against pltff. at trial, and made now in an unacceptable posture after the live witnesses have been heard and the record closed. It should not and will not be allowed. FRANKEL, J. (m/n)
Mar. 27-75	Filed pltff's reply brief
Apr. 14-75	Filed transcript of record of proceedings dated 2-10, 11-75
Apr. 14-75	Filed Opinion # 42247 and Order-- upon the facts stipulated and the evidence adduced in a bench trial, the court makes the following findings of fact and conclusions of law as indicated. The Clerk of the Court will enter judgment dismissing the complaint. A counterclaim having been dismissed at the trial, the court concludes it is fair in all the circumstances for each party to bear its own costs. So ordered- FRANKEL, J. (m/n)
Apr. 15-75	Filed Judgment- ordered that defts. Humble Oil & Refining Co. and M/T Esso Connecticut, her engines, tackle, etc. in rem have judgment against pltff. dismissing the complaint, and each party to bear its own costs. Clerk (m/n)
APR. 23-75	Filed transcript of proceedings dated — 2-10, 11-75
May 14-75	Filed pltff's notice of appeal from the final judgment entered on 4-15-75. Copy to: Kirlin, Campbell & Keating. Ent. 5-14-75
May 14, 197	Filed bond for undertaking for costs on Appeal in the sum of 250.00 - Nat'l Surety Corp.
Feb. 6-75*	Filed Affidavit by plaintiff, in further support of application for adjournment of trial of this case to on or about Feb. 18-75.
May 23-75	Filed notice that the record on appeal has been certified and transmittedto the USCA on 5-23-75.
May 23-75	Filed stipulation designating exhibits to be transmitted to U.S.C.A. (These exhib were submitted into evidence.)
MAY 23-75	Filed stipulation designating exhibits to be transmitted to U.S.C.A. (These exhib were not submitted into evidence.)

AMENDED COMPLAINT (Filed August 30, 1974)

filed 8/30/74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

. . . . . .

AMOCO SHIPPING COMPANY,

Plaintiff, :

-against- : AMENDED COMPLAINT

HUMBLE OIL & REFINING COMPANY and m/t ESSO CONNECTICUT, her engines, tackle, etc., in rem, : 74 Civ. 223 (MEF)

Defendants. :

. x

AMOCO SHIPPING COMPANY, through its attorneys, Haight, Gardner, Poor & Havens, as and for its Amended Complaint against HUMBLE OIL & REFINING COMPANY and m/t ESSO CONNECTICUT, alleges upon information and belief as follows:

AS AND FOR A FIRST CAUSE OF ACTION:

FIRST: This is a case of admiralty and maritime jurisdiction and is an admiralty and maritime claim within the meaning of Rule 9 (h) of the Federal Rules of Civil Procedure.

SECOND: That at all times hereinafter mentioned plaintiff was and now is a corporation organized and existing under the laws of one of the States of the United States, with an office and place of business at No. 555 Fifth Avenue, City, County and State of New York, within this district and within the jurisdiction of this Honorable Court and was at the time of the occurrence hereinafter mentioned, the bare-boat charterer of the s/s AMOCO DELAWARE which was tight, staunch, seaworthy and in all respects properly manned and equipped.

THIRD: That at all times hereinafter mentioned, defendant Humble Oil & Refining Company was and now is a corporation organized and existing under the laws of one of the States of the United States, with an office and place of business at Hutchison River Parkway, Pelham, County of Westchester, State of New York, and was the owner and operator of the m/t Esso Connecticut.

FOURTH: The m/t Esso Connecticut now is or during the pendency of this action will be within this District and within the jurisdiction of this Honorable Court.

FIFTH: On April 14, 1972, in the waters off of Port Jefferson, New York, the m/t Esso Connecticut, while off loading kerosene cargo into the s/s Amoco Delaware, which was properly anchored, struck the s/s Amoco Delaware. The s/s Amoco Delaware sustained substantial hull damage.

SIXTH: The aforesaid casualty and resulting damage sustained by the s/s Amoco Delaware were not caused or contributed to by any fault, negligence or want of care on the part of plaintiff, the s/s Amoco Delaware, or those in charge of the s/s Amoco Delaware but were caused solely as a result of the fault, negligence and want of care on the part of defendants, Humble Oil & Refining Company and the m/t Esso Connecticut and those in charge of that vessel in the following respects, among others, which will be pointed out at the trial of this action: (1) In that those in charge of the m/t Esso Connecticut were inattentive to their duties; (2) In that the m/t Esso Connecticut was improperly secured and tendered under the circumstances; (3) In that those in charge of the m/t Esso Connecticut failed to take proper account of the current and wind; (4) In that those in charge

of the m/t Esso Connecticut failed to conduct the lightering operation with appropriate caution and due care; (5) In that those in charge of the m/t Esso Connecticut failed to take any timely steps to avoid causing damage to the s/s Amoco Delaware when the danger of causing said damage was or should have been apparent; (6) In that the m/t Esso Connecticut and/or her machinery and/or her equipment were unseaworthy; and (7) In that the m/t Esso Connecticut was inadequately manned.

SEVENTH: As a result of the aforesaid collision, plaintiff sustained damage in the sum of $75,000, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT HUMBLE OIL & REFINING COMPANY.

EIGHTH: Plaintiff repeats and realleges each and every allegation in paragraphs First through Seventh with the same force and effect as though fully set forth herein.

NINTH: Heretofore and on or about the 30th day of March, 1972, the plaintiff and defendant, Humble Oil & Refining Company, entered into a charterparty or agreement in writing, a copy of which is annexed hereto, made a part hereof, and marked Exhibit 1.

TENTH: Plaintiff has duly performed all the duties and obligations on its part to be performed under the conditions of the charterparty.

ELEVENTH: Defendant Humble Oil & Refining Company has failed and neglected to perform the conditions on its part in that it has failed, in particular, to provide the vessel with a safe berth, assume the risk and has otherwise failed and neglected to perform its obligations under

the charterparty.

TWELFTH: As a result of the aforesaid breach, plaintiff sustained damages in the amount of $75,000, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

WHEREFORE, plaintiff prays that process in due form of law issue against the m/t Esso Connecticut and Humble Oil & Refining Company; that Humble Oil & Refining Company be cited to appear and answer all and singular the matters aforesaid; that the m/t Esso Connecticut be arrested; that judgment be granted in the amount of $75,000.00 against the m/t Esso Connecticut and against Humble Oil & Refining Company with interest and costs; that the m/t Esso Connecticut be condemned and sold to satisfy the judgment herein; and that plaintiff may have such other and further relief as in law and justice it may be entitled to receive.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff

By _____
A Member of the Firm

One State Street Plaza
New York, N. Y. 10004

ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIM (Filed August 30, 1974) JA8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - -

AMOCO SHIPPING COMPANY,

Plaintiff, : 74 Civil 223 (MEF)

- against - : ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIM

HUMBLE OIL & REFINING COMPANY and m/t ESSO CONNECTICUT, her engines, tackle, etc., in rem, :

Defendants. :

- -x

Exxon Company, U.S.A., a Division of Exxon Corporation, sued herein as Humble Oil & Refining Company, through its attorneys Kirlin, Campbell & Keating, answering the complaint of Amoco Shipping Company, alleges upon information and belief as follows:

FIRST: It admits the matters alleged in paragraph FIRST of the complaint.

SECOND: It admits the matters alleged in paragraph SECOND of the complaint, except it denies knowledge or information sufficient to form a belief as to whether plaintiff is the bareboat charterer of the SS AMOCO DELAWARE, and it denies that the AMOCO DELAWARE was tight, staunch, seaworthy, and in all respects properly manned and equipped.

THIRD: It admits the matters alleged in paragraph THIRD of the complaint.

FOURTH: It denies the matters alleged in paragraph FOURTH of the complaint.

FIFTH: It denies the matters alleged in paragraph FIFTH of the complaint.

SIXTH: It denies the matters alleged in paragraph SIXTH of the complaint.

SEVENTH: It denies the matters alleged in paragraph

SEVENTH of the complaint, except it admits a demand for money, which it alleges is grossly excessive.

EIGTH: No answer is required to paragraph EIGTH of the complaint.

NINTH: It admits the matters alleged in paragraph NINTH of the complaint.

TENTH: It denies the matters alleged in paragraph TENTH of the complaint.

ELEVENTH: It denies the matters alleged in paragraph ELEVENTH of the complaint.

TWELFTH: It denies the matters alleged in paragraph TWELFTH of the complaint, except it admits a demand for money, which it alleges is grossly excessive.

FIRST AFFIRMATIVE DEFENSE

THIRTEENTH: The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

FOURTEENTH: On April 13, 1972, in the waters off Port Jefferson, New York, the M/T ESSO CONNECTICUT was off-loading petroleum products from the SS AMOCO DELAWARE, which was anchored. The port side of the ESSO CONNECTICUT was properly made fast along the starboard side of the AMOCO DELAWARE. When the tide changed the AMOCO DELAWARE commenced swinging on her anchor, exposing the ESSO CONNECTICUT to the action of the seas. Because of the action of the seas, the ESSO CONNECTICUT commenced rolling heavily, and despite the fact that there was a sufficient and substantial number of fenders between the two vessels, the port side of the ESSO CONNECTICUT and the starboard side of the AMOCO DELAWARE came into contact. The port side of the ESSO CONNECTICUT suffered substantial damage, her mooring

lines were damaged by sharp edges on the AMOCO DELAWARE's boat and several of her fenders were damaged or lost. Those in charge of the AMOCO DELAWARE negligently failed to prevent the AMOCO DELAWARE from swinging and exposing the ESSO CONNECTICUT to the action of the seas, and negligently failed to assist those on the ESSO CONNECTICUT in preventing contact between the two vessels. The contact between the two vessels was solely caused by the fault and negligence of those in charge of the ss AMOCO DELAWARE. Defendant reserves the right to amend this paragraph when additional facts become available.

FIFTEENTH: It repeats and realleges the matters alleged in paragraphs FIRST through TENTH of this Answer with the same force and effect as set forth at length herein.

SIXTEENTH: As a result of the aforesaid contact between the ESSO CONNECTICUT and the AMOCO DELAWARE, defendant has sustained damages in the approximate sum of $5,000, including the cost of repairs to the ESSO CONNECTICUT and related expenses, no part of which has been paid, although duly demanded. Defendant reserves the right to amend this counterclaim to state the exact amount of its damages when ascertained.

WHEREFORE, defendant demands:

1. That the complaint herein be dismissed with costs and disbursements;

2. That it may have judgment on its counterclaim for its damages with interest, costs and disbursements, and

3. That it may have such other and further relief as may be just and proper in the premises.

Dated: New York, New York
August 30, 1974

KIRLIN, CAMPBELL & KEATING

By _____
A Member of the Firm
Attorneys for Defendant
120 Broadway
New York, New York 10005

PRE-TRIAL ORDER (Filed December 5, 1974) (pp. JA11 to JA23)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

AMOCO SHIPPING COMPANY, :

Plaintiff, :

-against- :

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc. in rem,

Defendants.

. . . . . .

US DISTRICT COURT FILED DEC 5 1974 SD OF NY

PRE-TRIAL ORDER

223 MEF

The attorneys for the parties appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure and the following actions were taken:

1. The pleadings were amended and require no further amendment.

2. The parties agree that the trial of this cause shall be based upon this order and the pleadings as amended except that the following issues raised by the pleadings are expressly abandoned: NONE.

3. (a) The parties stipulate that the following facts are not in dispute (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

(1) That on or about the 30th day of March, 1972, the plaintiff and defendant, Humble Oil & Refining Company, entered into a charter party designated as Essovoy 1969, for the use of the s/s Amoco Delaware.

(2) That pursuant to said charter party, the Amoco Delaware was loaded at Humble Oil Refinery, Baytown, Texas with a cargo of kersene and No. 2 oil.

(3) That pursuant to defendant's orders under the aforementioned charter party, the Amoco Delaware proceeded to Port Jefferson, New York, to discharge its cargo.

(4) That Clause 9 of the charter party reads as follows:

> "9. SAFE BERTHING-SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer. The Charterer shall have the right of shifting the Vessel at ports of loading and/or discharge from one safe berth to another on payment of all towage and pilotage shifting to next berth, charges for running lines on arrival at and leaving that berth, additional agency charges and expense, customs overtime and fees, and any other extra port charges or port expenses incurred by reason of using more than one berth. Time consumed on account of shifting shall count as used laytime except as otherwise provided in Clause 15."

(5)That the s/s Amoco Delaware anchored off Port Jefferson, New York on or about April 13, 1972, at approximately 1430 hours.

(6) That upon arrival off Port Jefferson, the draft of the Amoco Delaware was approximately 33 feet, 9 inches forward and 32 feet, 7 inches aft.

(7) That on or about April 13, 1974, neither the Port Jefferson Harbor nor the Consolidated Oil Berth was capable of receiving a vessel of such a draft.

(8) That the Esso Connecticut, now renamed the Exxon Connecticut, is a vessel owned by Exxon Company, U.S.A., successors by merger to Humble Oil & Refining Company.

(9) That the Esso Connecticut is a tank vessel of approximately 1729 gross tons and has a length overall of approximately 276 feet.

(10) That at 1440 hours, on April 13, 1972, the Amoco Delaware, received the first line from the Esso Connecticut.

(11) That at 1450 hours, on April 13, 1972, the Esso Connecticut was made fast to the starboard side of the Amoco Delaware, while she was anchored off Port Jefferson, New York,

(12) That the mooring lines used to secure the vessels were supplied by the Esso Connecticut.

(13) That the fenders used to separate the vessels were supplied by the Esso Connecticut and secured to the Esso Connecticut.

(14) That the cargo hoses used to transfer cargo between the two vessels was supplied by the Esso Connecticut.

(15) That at approximately 1740 hours, the hose of the Esso Connecticut was disconnected aboard the Amoco Delaware.

(16) That at approximately 1745 hours, the Esso Connecticut was away from the starboard side of the Amoco Delaware.

(17) That a Report of Vessel Casualty and Accident was filed by Captain Jarrett, Master of the Amoco Delaware, on July 26, 1972.

(18) That a Report of Vessel Casualty and Accident was filed by R. L. Vukin, Operational Manager of Humble Oil & Refining Company, on August 14, 1972.

(19) That on July 25, 1972, a joint survey of the Amoco Delaware was held and Mr. Bill Oliver of Humble Oil & Refining Company was in attendance.

(b) Plaintiff's contentions as to liability and damages are as follows:

(1) That the casualty and resulting damage sustained by the s/s Amoco Delaware, were caused solely as a result of the fault, negligence and want of care on the part of the defendants, Humble Oil & Refining Company and the m/t Esso Connecticut and those in charge of that vessel in the following respects, among others, which will be pointed out at the trial of this action: (1) In that those in charge of the m/t Esso Connecticut were inattentive to their duties; (2) In that the m/t Esso Connecticut was improperly secured and tended under the circumstances; (3) In that those in charge of the m/t Esso Connecticut failed to take proper account of the current and wind; (4) In that those in charge of the m/t Esso Connecticut failed to conduct the lightering operations with appropriate caution and due care; (5) In that those in charge of the m/t Esso Connecticut failed to take any timely steps to avoid causing damage to the s/s Amoco Delaware when the danger of causing said damage was or should have been apparent; (6)

In that the m/t Esso Connecticut and/or her machinery and/or her equipment were unseaworthy; and (7) In that the m/t Esso Connecticut was inadequately manned.

(2) That defendant Humble Oil & Refining Company has failed and neglected to perform its obligations under the charter party in that it failed to (1) provide the vessel with a safe berth, (2) assume the risk and expense of lightering the Amoco Delaware, and/(3) has otherwish failed and neglected to perform its obligations under the said charter party.

(3) That under the charter party, Clause 9, the charterer expressly warranted that the Amoco Delaware shall discharge at any safe place or wharf or alongside vessels or lighters reachable on her arrival, provided that the vessel can proceed thereto, be at and depart therefrom always safely afloat.

(4) That under the charter party, Clause 9, it is expressly provided that lighters shall be designated and procured by the charterer.

(5) That under the charter party, Clause 9, it is expressly provided that all lighterage is "to be at the expense, risk and peril of the charterer";

(6) That the Esso Connecticut is a vessel primarily used for lightering operations and has performed such operations on numerous occasions off Port Jefferson.

(7) That the Chief Officer aboard the Amoco Delaware, Svend Bonde, is a licensed pilot, and as such, should be thoroughly familiar with the tide, wind and weather conditions off Port Jefferson.

(8) That at approximately 1735 hours, Captain Jarrett, Master of the Amoco Delaware, ordered the Chief Officer aboard the Amoco Delaware to stop pumping, as the Esso Connecticut was surging and slamming violently against the starboard side of the Amoco Delaware.

(9) That on April 13, 1972, the Master of the Amoco Delaware did inform the Master of the Esso Connecticut via a note of protest that the m/t Esso Connecticut did come into violent contact with the starboard side of the Amoco Delaware during the lightering operation in question.

(10) That plaintiff, prior to this litigation, was never advised that: (1) any damage was sustained by the Esso Connecticut, or (2) a survey of the Esso Connecticut would be held.

(11) That the Esso Connecticut upon supplying lines and fenders, as stipulated, had a duty to see that the vessel was properly secured and tended.

(12) If defendant suffered any damage as a result of the contact between the two vessels, which is denied, the physical damage was minor and plaintiff's money damages claimed are grossly excessive.

(c) The defendant's contentions as to liabilityland damages are as follows:

(1) That the port side of the Esso Connecticut was properly made fast along the starboard side of the Amoco Delaware.

(2) That when the tide changed the Amoco Delaware commenced swinging on her anchor, exposing the Esso Connecticut to the action of the seas.

(3) That because of the seas, the Esso Connecticuut commenced rolling, and despite the fact that there was a sufficient and substantial number of fenders between the two vessels, the port side of the Esso Connecticut and the starboard side of the Amoco Delaware came into contact.

(4) That the port side of the Esso Connecticut suffered substantial damage, her mooring lines were damaged by sharp edges of the Amoco Delaware's deck and several of her fenders were damaged and lost.

(5) That it was not possible for the Esso Connecticut to leave the side of the Amoco Delaware until the Amoco Delaware stopped discharging cargo into the Esso Connecticut and disconnected the cargo hoses.

(6) That as soon as the Amoco Delaware stopped discharging cargo into the Esso Connecticut and disconnected the two cargo hoses, the Esso Connecticut immediately left the side of the Amoco Delaware.

(7) That no one on board the Amoco Delaware ever asked or told those in charge of the Esso Connecticut to leave the side of the Amoco Delaware nor did they permit the Esso Connecticut to leave the side of the Amoco Delaware until they stopped discharging cargo and disconnected the cargo hoses at about 1740 on April 13, 1972.

(8) That those in charge of the Amoco Delaware negligently failed to prevent the Amoco Delaware from swinging and exposing the Esso Connecticut to the actions of the seas, and negligently failed to assist those on the Esso Connecticut in preventing contact between the two vessels.

(9) That the contact between the two vessels was solely caused by the fault of negligence of those in charge of the Amoco Delaware in that (a) they were inattentive to their duties, (b) failed to take proper account of the current and the wind, (c) failed to anticipate the swing of the Amoco Delaware on its anchor at the change in tide and the resultant effect such swing would have on the Esso Connecticut, (d) that those in charge of the ~~Esso Connecticut~~ A.D. failed to conduct the lightering operations with appropriate caution and due care, (e) that those in charge of the Amoco Delaware failed to take any timely steps to avoid causing damage to the two vessels when the danger of causing damage was or should have been apparent due to existing conditions, (f) that the Amoco Delaware and/or her machinery and/or her equipment were unseaworthy, and (g) that the Amoco Delaware was inadequately manned.

(10) If plaintiff suffered any damage as a result of the contact between the two vessels, which is denied, the physical damage was minor and plaintiff's money damages claimed are grossly excessive.

(11) That defendant has fully complied with and performed all of its obligations under the charter party.

4. (a) Plaintiff's Exhibits. The plaintiff expects to offer some or all of the following exhibits:

*(1) Charter party dated March 30, 1972.

*(2)) Voyage instructions.

(3) Telexes regarding voyage instructions.

(4) Port log.

(5) Pertinent documents regarding tide, wind and weather.

*(6) Deck and engine log books of the Amoco Delaware.

*(7) Deck and engine log books of the Esso Connecticut.

*(8) Deck and engine bell books of the Amoco Delaware.

*(9) Deck and engine bell books of the Esso Connecticut.

(10) All survey reports, notes, work requests and other writings concerning the hulls of the Amoco Delaware and Esso Connecticut.

*(11) The general arrangement plan and capacity plans of the Amoco Delaware and Esso Connecticut.

(12) Instructions, messages or other written communications given to plaintiff by defendant regarding anchoring the Amoco Delaware off Port Jefferson.

*(13) Vessel Casualty and Accident Reports of the Amoco Delaware and Esso Connecticut.

(14) Correspondence between plaintiff and defendant regarding this matter.

*(15) Appropriate chart of the Port Jefferson, New York area.

(16) Notice of protest dated April 13, 1972.

In addition to certain documents listed by the defendants, plaintiff reserves the right to offer such further exhibits as may be required for impeachment purposes.

(b) Defendants' Exhibits. The defendant expects to offer some or all of the following exhibits:

*(1) Charter party dated March 30, 1972.

*(2) Voyage instructions.

(3) Telexes regarding voyage instructions.

(4) Port log.

(5) Pertinent documents regarding tide, Wind and weather.

*(6) Deck and engine log books of the Esso Connecticut.

*(7) Deck and engine bell books of the Esso Connecticut.

*(8) Deck and engine log books of the Amoco Delaware.

*(9) Deck and engine bell books of the Amoco Delaware.

(10) All survey reports, notes, work requests and other writings concerning the hulls of the Esso Connecticut and Amoco Delaware.

*(11) The general arrangement plans, capacity plans and lines drawings of the Esso Connecticut and Amoco Delaware.

(12) Instructions, messages or other written communications given to plaintiff by defendant regarding anchoring the Amoco Delaware off Port Jefferson, New York on or about April 13, 1972.

*(13) The vessel casualty and accident reports of the Esso Connecticut and Amoco

(14) Correspondence between plaintiff and defendant regarding this matter.

(15) The course recorder tape of the Amoco Delaware in use on or about April 13, 1972.

*(16) Appropriate chart of the Port Jefferson, New York area.

(17) Report of John C. Jarrett, Master, s/s Amoco Delaware dated 14 April 1972.

In addition to certain documents listed by plaintiff, defendants reserve the right to offer such further exhibits as may be required for impeachment purposes.

(c) Of the documents listed in paragraph 4(a) and (b) hereof, those marked with an asterisk are conceded to be genuine without conceding admissability. All others are deemed marked for identification only.

5. (a) Plaintiff's Witnesses. The plaintiff expects to call some or all of the following witnesses:

(1) A marine expert.

(2) A marine surveyor.

(3) The master, officers and/or crew members assigned to the Esso Connecticut at the time in question.

(4) Officers and/or crew members assigned to the Amoco Delaware at the time in question.

In addition to witnesses listed by defendants, plaintiff reserves its right to call impeachment witnesses on credibility matters.

(b) Defendants' Witnesses. The defendant expects to call some or all of the following witnesses:

(1) The master, officers or crew members assigned to the Esso Connecticut at the time in question.

(2) The officers and crew members assigned to the Amoco Delaware.

(4) A marine surveyor.

In addition to witnesses listed by plaintiff, defendant reserves its right to call impeachment witnesses on credibility matters.

(c) The parties agree that the witnesses from each party now intends to call, along with the speciality of the experts to be called, are those listed above. Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each party in writing, setting forth the reason why such witness was not theretofore identified. No witness may be called at trial unless identified as above stated.

6. The following are all of the claims asserted by plaintiff in this action as of the date of this order: Damages sustained as a result of theaforesaid collision and breach $75,000; and costs, disbursements and attorneys' fees incurred in the defense of the counterclaim.

(b) The following are all of the claims asserted by defendants in this action as of the date of this order: Damages sustained in the approximate sum of $5,000.

7. A trial of this action should take two (2) days.

8. The issues to be tried are formulated by the Court as follows:

(a) Were defendants negligent, as contended in paragraph SIXTH of the Amended Complaint and paragraph 3(b)(1) of this Order, and did such negligence contribute in whole or in part to plaintiff's damages?

(b) Did Defendant, Humble Oil breach its duty and/or duties under the charter party as contended in paragraph ELEVENTH of the Amended Complaint and paragraph 3(b)(1) of this Order and, if so, was such breach the proximate cause of plaintiff's damages, if any?

(c) Did the Esso Connecticut have a duty, when supplying lines and fenders, as stipulated, to see that said lines and fenders were proper and that the vessels were properly secured and tended?

(d) Were the lines and fenders supplied by the Esso Connecticut improper?

(e) Did the Esso Connecticut breach its duty to properly secure and tend the vessels?

(f) What is the pecuniary value of plaintiff's damages, if any?

REGARDING THE COUNTERCLAIM:

(a) Was the plaintiff negligent as claimed in paragraph FOURTEENTH of the Answer to Amended Complaint and paragraph 3(c) (1) of this Order?

(b) What is the pecuniary value of defendant's damages, if any?

Dated: New York, N. Y.
December 4, 1974.

SO ORDERED:

S. Marvin E. Frankel
U.S.D.J.

CONSENTED TO:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff

By John M. Walker Jr
A Member of the Firm

KIRLIN, CAMPBELL & KEATING
Attorneys for Defendants

By Alexander D. Kirgan
A Member of the Firm

AFFIDAVIT OF RICHARD A. CORWIN (Filed January 8, 1975)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

3150-2 HMG RAC 2JM

. x

AMOCO SHIPPING COMPANY, :

Plaintiff, :

-against- : 74 Civ. 223 MEF

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc. in rem,

Defendants.

. . . . . .

SERVED JAN 8 1975

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FILED 1/8/75

RICHARD A. CORWIN, being duly sworn, deposes and says:

1. That I am an attorney associated with the firm of Haight, Gardner, Poor & Havens, attorneys for the plaintiff herein, and am fully familiar with prior proceedings had heretofore in this matter.

2. That this is an action by Amoco Shipping Company, the bareboat charterer of the s/s Amoco Delaware to recover damages for a collision which occurred during a lighterage operation with the m/v Esso Connecticut on April 13, 1972.

3. That this is a non-jury action.

4. That Mr. Swaniger, the Court Clerk has informed this office that this action is scheduled to be set down for trial on 48 hours notice.

5. That Mr. C. J. Bysarovich, the Vice-President of Amoco Shipping Company, the plaintiff, was called out of

the country on business and will be in the Far East until February 10, 1975.

6. That Mr. Bysarovich is an important and necessary witness and his unavailability at trial will severely prejudice the plaintiff.

WHEREFORE, your deponent prays that this matter not be set down for trial prior to February 10, 1974.

S/

RICHARD A. CORWIN

Sworn to before me this

8th day of January, 1975.

S/

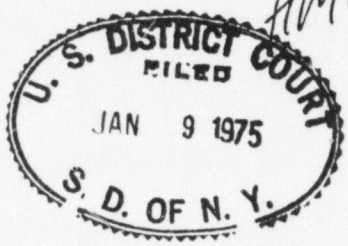
Notary Public

LYNNE CAHILL
Notary Public, State of New York
No. 41-5568330
Qualified in Queens County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1976

36

MEMORANDUM OPINION NO. 41697
(Filed January 9, 1975)

3150-22 HMW



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

AMOCO SHIPPING COMPANY,

Plaintiff,

-against-

HUMBLE OIL & REFINING COMPANY, et al.,

Defendants.

- x

FRANKEL, D.J.

This case has been set for trial on 48 hours' notice since December 4, 1974. On January 7, 1975, giving much more than 48 hours' notice, the court notified the parties that the case would go to trial on the morning of January 21, 1975. Then, and not before then, counsel for plaintiff made an affidavit saying that the plaintiff's Vice President, Mr. C.J. Bysarovich, has been "called out of the country on business and will be in the Far East until February 10, 1975." Upon this bare assertion, evidently assuming that business convenience must inevitably precede the needs of the court's schedule, counsel for plaintiff requests an adjournment until after February 10.

The request should be, and it is, denied. There is ample time, indeed over a month, for the plaintiff, which started this case, to make suitable arrangements to meet the court's schedule under which everybody has been given the fullest possible notice.

The trial will commence as heretofore ordered at 10 a.m. on January 21, 1975, in Courtroom 102.

It is so ordered.

Dated: New York, New York
January 8, 1975

Marvin E. Frankel
U.S.D.J.

AFFIDAVIT OF JOSEPH T. STEARNS (Filed January 15, 1975)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

. x

AMOCO SHIPPING COMPANY, :

Plaintiff,

-against- : 74 Civ. 223 (MEF)

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc. in rem, :

Defendants. :

. x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, being duly sworn, deposes and says:

1. That I am an attorney associated with the firm of Haight, Gardner, Poor & Havens, attorneys for the plaintiff herein, and am making this affidavit to supplement the affidavit of Richard A. Corwin dated January 8, 1975, as Mr. Corwin is presently in Europe taking depositions in another matter, and to request that this Court reconsider its Memorandum of January 8, 1975.

2. Plaintiff appreciates the fact that the Court has set a date certain for trial and that the parties were notified two weeks in advance. Accordingly, it is only with great reluctance that I submit this application for an adjournment of the trial date until, at least, February 10, 1975.

3. Mr. Corwin advised me, prior to his leaving the country, that his affidavit of January 8th was intended

to advise the court of the present predicament before the matter was set down for trial and before it became necessary for the court to rearrange its schedule. Mr. Corwin further advised that he did not receive the court's notice, notifying the parties that the case was set down for trial on January 21, 1975, until after our paralegal was directed to submit the application for an adjournment.

4. Mr. Bysarovich is the Vice President of Amoco Shipping Company, the plaintiff, and is the only one familiar with the damage aspects of this case. As the supervisor of Marine Operations he was the individual to whom all bills and surveys were submitted, to whom all reports were made and the one who authorized all repairs.

5. On January 10, 1975, I was advised that Mr. Odd Klaveness, the chief officer on board the s/s Amoco Delaware at all pertinent times, is now deceased. In light of the fact that both the captain and chief officer aboard the s/s Amoco Delaware at all pertinent times are now dead, Mr. Bysarovich's testimony becomes an absolute necessity, if plaintiff is to succeed in this action.

6. Plaintiff respectfully submits that it does not assume that business conveniences must inevitably precede the needs of the court schedule. However, it should be pointed out that this case was scheduled to be set down for trial on 48 hours' notice on or after January 2, 1975, and that Mr. Bysarovich, with this in mind, delayed his trip until this week. Unfortunately, he is unable to delay it any longer.

7. Mr. Bysarovich, as Vice President of Amoco Shipping, must go to the Far East to accept delivery of a 150,000 ton vessel worth several millions of dollars

and to arrange to transfer the vessel from Japan to Singapore. The ship will be launched next week.

8. Mr. Bysarovich is presently in Chicago preparing for his Far East trip and is not scheduled to return from the Far East until February 10, 1975.

9. This action is non-jury and at the time of trial, in light of the fact that both the captain and the chief officer of the s/s Amoco Delaware are deceased, Mr. Bysarovich and a marine expert will most likely be the only witnesses called by the plaintiff. With this in mind, it is anticipated that this matter will not require more than a one-day trial.

10. Mr. Swaniger, the court clerk, has suggested that the way to cure this dilemma is to settle this matter. Settlement has been discussed on numerous occasions with defendants' counsel. However, the very issue that has precluded settlement is the one on which Mr. Bysarovich will testify - damages.

11. Once again plaintiff wishes to stress the importance of Mr. Bysarovich's testimony and the fact that plaintiff will be severely prejudiced if Mr. Bysarovich is unavailable at trial.

WHEREFORE, your deponent respectfully prays that this matter not be set down for trial prior to February 10, 1975.

_____
Joseph T. Stearns

Sworn to before me this
day of January, 1975.

_____
Notary Public

AFFIDAVIT OF JOSEPH T. STEARNS (Filed February 5, 1975)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMOCO SHIPPING COMPANY,

Plaintiff,

- against -

AFFIDAVIT

74 Civ. 223 MEF

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc., in rem,

Defendants.

---x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law associated with Haight, Gardner, Poor & Havens, attorneys for plaintiff. I make this affidavit in support of plaintiff's further application for an adjournment of the trial of this case to on or about February 18, 1975.

2. This is a collision case in which plaintiff seeks recovery of damages from the defendant as a result of a collision of the s/s Amoco Delaware, a vessel bareboat chartered by plaintiff with the s/s Esso Connecticut, a lighter owned and operated by Humble Oil and Refining Company. This is a second application for an adjournment, the first was sought to adjourn the trial date from January 21, 1975 to February 10, 1975. At approximately 4:00 p.m. on Tuesday, February 4, 1975, we received a telephone call from the Court's clerk notifying us that

trial was scheduled to commence Monday, February 10, 1975. It was our understanding that the time when the previously adjourned request was granted the case would be subject to trial call on 48 hours notice on or after February 10, 1975. We had expected that we would not be scheduled to proceed to trial until February 12, 1975, at the earliest. After the initial adjournment application was made, we were informed by the office of Mr. C. J. Bysarovich, Vice President of Amoco Shipping Company, that this necessary witness, who was on a business trip to Japan, would be delayed and was not expected to return to New York until February 16, 1975. We have confirmed this fact today. Mr. Bysarovich is the sole witness employed by plaintiff who can give necessary testimony on the issue of damages. His non-availability was the reason for the earlier application as well and we asked for an adjournment only to February 10, 1975 because we then expected that he would return by that date. It is unfortunately necessary to again ask that the case be adjourned from the scheduled trial date to February 18, 1975, since, we understand, that Monday, February 17, 1975, is a holiday. But this application is not made solely on the basis of the unavailability of Mr. Bysarovich, although, as we have stated, he is a necessary witness.

3. On January 28, 1975, we received notification from Judge Metzner that the case of Anthony Rotondo against P. Meyer, Oslo, 72 Civ. 1249, was scheduled to begin on February 10, 1975. Settlement of the case before Judge Metzner has been discussed and the last demand in settlement by plaintiff was $100,000. In that case plaintiff claims permanent loss of hearing resulting in his retirement at

the age of 53 allegedly due to the accident in suit. I have been handling that case under the supervision of Hollis M. Walker, Jr., who is the partner in charge of this case as well. It is Mr. Walker's intention to act as trial counsel in both cases. There is little or no likelihood that the case before Judge Metzner will be settled since we have ample proof that plaintiff's hearing loss antedated the accident in suit. The only associate actively engaged in handling of Your Honor's case has been Mr. Edward J. Murphy, a recent law school graduate who is not yet admitted to either the State or District Courts. I have made this affidavit and the earlier affidavit in support of the adjournment to February 10, 1975 because Mr. Walker was not at either time available. At the time of the making of the earlier affidavit he was in the New Hebrides in connection with a collision case occurring in the Port of Santo and I am making the present affidavit because Mr. Walker is presently attending the Coast Guard hearings investigating the collision of the s/s Chevron Queeny and m/s Corinthos which occurred Friday, January 31, 1975, at Marcus Hook, Pennsylvania. Mr. Walker is attending these hearings on behalf of owners of the cargo aboard m/s Corinthos, American International Oil Company. It is respectfully requested, in view of the actual engagement of Mr. Walker at a trial to begin before Judge Metzner on February 10, 1975, and the unavailability of the necessary witness, that this matter be adjourned to the week following.

/s/ JOSEPH T. STEARNS

Sworn to before me this
5th day of February, 1975.

/s/ Notary Public

ORDER TO SHOW CAUSE (Dated February 11, 1975)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

AMOCO SHIPPING COMPANY,

Plaintiff,

-against-

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc. in rem,

Defendants.

ORDER TO SHOW CAUSE

----------x

Upon the annexed affidavit of Hollis G. Walker Jr., sworn to on the 11th day of February, 1975, it is

ORDERED, that Humble Oil & Refining Company, located at Hutchison River Parkway, Pelham, New York, show cause at the United States Courthouse, Foley Square, City, County and State of New York, at 10:30 A.M. in the forenoon on February 18, 1975, in Room before the Honorable Marvin E. Frankel, United States District Judge, why a decree should not be entered herein permitting the testimony of Chester J. Bysarovich to be taken, either before the Court or at the offices of Haight, Gardner, Poor & Havens, at a mutually convenient time, during the week of February 17, 1975, and permitting this testimony to be filed with or before the trial transcript of this action.

IT IS FURTHER ORDERED, that personal service of a copy of this Order to Show Cause and of the papers on which the same is granted be made upon the said Humble Oil & Refining Company at the offices of its attorneys, Kirlin Campbell & Keating, 120 Broadway, New York, New York, on or before 5:00 P.M. on February , 1975.

Dated: New York, New York
February 11, 1975

U.S.D.J.

AFFIDAVIT OF H.M. WALKER, JR. (Dated February 11, 1975)
ANNEXED TO FOREGOING ORDER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMOCO SHIPPING COMPANY,

Plaintiff,

-against-

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc. in rem,

Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HOLLIS M. WALKER, JR., being duly sworn, deposes and says.

He is an attorney and member of the firm of Haight, Gardner, Poor & Havens, attorneys for AMOCO SHIPPING COMPANY and is fully familiar with the pleadings and proceedings heretofore had herein.

This matter was originally scheduled for trial on January 21, 1975, and was adjourned until February 10, 1975 on 48 hours notice. A second adjournment was requested on February 5, 1975. This application was denied and a trial was held on February 10th and February 11, 1975. The reason for the original adjournment was that Mr. C.J. Bysarovich the Vice President of Amoco Shipping Company, was out of the country and was expected to return on February 10, 1975. Mr. Bysarovich is the only person presently in plaintiff's employ, familiar with the damage aspect of this action.

Subsequent to the granting of the first adjournment, Mr. Bysarovich was unexpectedly delayed for one week. The Court was informed of plaintiff's predicament, and plaintiff applied for a one-week adjournment stressing Mr. Bysarovich's importance to plaintiff's case. This

Affidavit of H.M. Walker, Jr. Annexed to Foregoing Order

application was denied.

Even though plaintiff's application for a further adjournment was denied, we believe that in view of the fact that the court reporter advised the court and counsel that the trial record would not be available for at least three weeks, that this justifies the taking of Mr. Bysarovich's testimony in the interim. This will not prejudice or unduly inconvenience either the court or counsel and the ends of justice certainly will be served.

WHEREFORE, your deponent respectfully prays that this Honorable Court sign a decree permitting the testimony of C.J. Bysarovich to be taken, either before the Court or at the offices of Haight, Gardner, Poor & Havens, during the week of February 17, 1975, and permitting this testimony to be filed with or before the trial transcript of this action.

HOLLIS M. WALKER, JR.

Sworn to before me this 11th day of February, 1975.

Notary Public

GEORGE J. BIERNESSER
Notary Public, State of New York
No. 31-5316775
Qualified in New York County
Commission Expires March 30, 1976

MEMO ENDORSEMENT OF JUDGE FRANKEL (Filed February 13, 1975)

PLEASE TAKE NOTICE that

of which the within is a copy, will be presented for settlement and signature to the Hon.
one of the of this Court at

Borough of
City of New York, on the day of
, 19 , at M.
Dated, New York, 19

Yours &c.,
HAIGHT, GARDNER, POOR & HAVENS
Office and Post Office Address:
One State Street Plaza,
Borough of Manhattan,
New York, N. Y. 10004
for

To

for

U.S. DISTRICT COURT
FILED
FEB 13 1975
S. D. OF N.Y.

Feb. 13, 1975

This motion is an effort to revive a question twice ruled against plaintiff at trial, and made now in an unacceptable posture after the five witnesses have been heard and the record closed. It should not and will not be allowed.

Hans. E. Frankel
U. S. D. J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED APRIL 14, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

AMOCO SHIPPING COMPANY,

Plaintiff,

-against-

HUMBLE OIL & REFINING COMPANY
and M/T ESSO CONNECTICUT,
her engines, tackle,
etc., in rem,

Defendants

- x

FRANKEL, D.J.

Plaintiff brought this suit to recover damages allegedly suffered by its vessel, the s/s Amoco Delaware, during a lightering operation with defendant Humble Oil's lighter, the m/t Esso Connecticut. Upon the facts stipulated and the evidence adduced in a bench trial, the court makes the following findings of fact and conclusions of law.

I.

The parties, on March 30, 1972, entered into a charter party providing for the use of the plaintiff's vessel. The Amoco Delaware was loaded with kerosene and No. 2 oil at Baytown, Texas, and proceeded to Port Jefferson, New York, where

it was to unload the cargo. The vessel anchored about 1/4 mile off the Port Jefferson sea buoy on April 13, 1972, at approximately 1430 hours; as had been anticipated, the draft of the Amoco Delaware made it impossible for her to dock at the berth at which she would eventually discharge the bulk of her cargo. Defendant designated two lighers, the Esso Connecticut and the Chester A. Poling to lighter the vessel at anchor. The Esso Connecticut arrived at about 1450 hours to commence lightering and took a position along the starboard side (which was at the time the lee side) of the Amoco Delaware, the latter being headed at the time in a westerly direction. It was anticipated that when the Amoco Delaware began to swing with the current at about 1700, the Esso Connecticut would remain in the lee of the larger vessel.

Contrary to those expectations, the Amoco Delaware began to swing in a direction (her stern through the south) which exposed the Esso Connecticut to the seas and caused the latter to begin rolling sometime after 1715. The vessels were secured by five mooring lines and were separated by four fenders which were placed over the side, with three more fenders in reserve. At no time did any officer of the Amoco Delaware complain about the adequacy of the numbers or positions of the fenders and

and lines. The rolling, which began at about 1715, suddenly worsened at about 1730, at which time the crew of the Esso Connecticut sought to protect both ships by putting out extra fenders and lines to replace those which had been torn away. This action did not seem sufficient, and the masters of both ships decided at 1735 that the lightering operation would have to cease and the ships separate. The separation was accomplished in ten minutes, which both sides concede is as short a time as the operation could have been thought reasonably to require. The lightering was resumed without incident after the Amoco Delaware had completed her swing with the tide.

During the time of the Amoco Delaware's swing with the tide, the second lighter, the Chester A. Poling, came alongside the Amoco Delaware. The log of the Amoco Delaware reports that the Poling was made fast on the Amoco Delaware's port side at 1730, some 15 minutes after the Esso Connecticut began to roll. While the Poling was selected by defendant Humble to participate in the lightering operation, it is undisputed that the master of the Amoco Delaware was free to determine the time at which the Poling would tie up alongside his ship.

II

Prudent management in the circumstances would have entailed action by the master of the s/s Amoco Delaware to make certain that the smaller, lightering craft, the Esso Connecticut, remained on the lee side throughout the operation. This could and should have been ensured by timely use of the Amoco Delaware's engine and/or rudder to make certain that the ship swung with its stern through the north rather than the south. The arrival of the Poling during the swing of the Amoco Delaware did not alter the latter vessel's duty in this respect. As has been noted, the larger vessel could and should have postponed the Poling's arrival alongside for as long as prudent seamanship required. In failing to take timely action to keep the Esso Connecticut on the protected side, those in charge of the Amoco Delaware were negligent, even though this should be and is deemed a case of relatively slight negligence. See Mackey v. United States, 197 F.2d 241, 244 (2d Cir. 1952); Continental Insurance Co. v. S.S. Alcoa Roamer, 1957 A.M.C. 1522, 1525 (S.D.N.Y. 1957). Granting the modest character of the fault, plaintiff is thereby precluded from assigning to defendant the burden of bearing the alleged damages.

Findings of Fact and Conclusions of Law Filed April 14, 1975

The finding of fault on the part of the Amoco Delaware is sufficient to dispose of plaintiff's major argument built upon clause 9 of the charter party. The subject does not warrant extended discussion. Suffice it to say that the language plaintiff invokes cannot support a claim for alleged damages flowing from its own negligence.

There is, in any event, a further, and independently decisive, barrier to plaintiff's attempted recovery. Viewing the record as a whole, the court finds a failure by plaintiff to sustain the burden of proving damages proximately resulting from the claimed mishap.* There is, to be sure, some evidence in support of this aspect of the claim. Upon the whole record, however, and in light of the countervailing evidence, the court finds no sufficient proof that the Amoco Delaware suffered any damage whatever in the incident leading to this action.

The Clerk of the Court will enter judgment dismissing the complaint. A counterclaim having been dismissed at the trial, the court concludes it is fair in all the circumstances for

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* It should be recorded in this connection, for reasons amply outlined by defendant, that Plaintiff's Exhibits 4 and 5 have been excluded.

each party to bear its own costs.

So ordered.

Dated, New York, New York
April 14, 1975

s/ Marvin E. Frankel
U.S.D.J.

el/lf 9

* * *

in this case.

MR. BOWLES: No objection.

xxx (Plaintiff's Exhibit 7 received in evidence.)

MR. WALKER: Your Honor, at this time I call to the stand Mr. George Kellner.

G E O R G E M. K E L L N E R, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALKER:

Q Mr. Kellner, by whom are you employed?

A Amoco Shipping Company.

Q Where do you work?

A 555 Fifth Avenue, New York.

Q How long have you been with them?

A 22 years.

Q You heard me offer in evidence the transcript of Mr. Klaveness and the report of Captain Jarrett. Could you tell me, are those people still employed by Amoco Shipping?

A It's my understanding that both are deceased.

Q Both are deceased?

A Both are deceased, Captain Jarrett and Odd Klaveness.

Q Is there a practice in Amoco that when a master has an incident involving damage to his ship that he prepare

a report to the company?

A Yes.

Q I refer now to Plaintiff's Exhibit 5 marked for identification and ask you if that is such a report prepared by Captain Jarrett.

A That's correct, it is. It's a report that we normally require our masters to file and we keep it on file in our office.

Q Are these reports kept in the regular course of the Amoco Shipping Company's business?

A That's correct.

MR. WALKER: I again offer this in evidence, your Honor.

MR. BOWLES: Objection. This is a self-serving statement prepared by the master who has never been deposed, he's never had an opportunity to be subjected to cross examination. There is no precedent for allowing such a document in evidence.

THE COURT: I am inclined to think you are right, but with the luxury of a non-jury case why don't I ask you both to get in memoranda on that particular exhibit. Perhaps we'll have brief post-trial memoranda and I will rule explicitly on that in deciding the case. That is, on the admissibility of that report. I think it should be excluded

but I'm not sure. So why don't you tell me why you think I should receive it, citing your authorities, and you on the other side. And I will indicate in whatever findings and conclusions we file, what the ruling was on this particular thing.

MR. BOWLES: We will have plaintiff's memorandum first before we have to reply, your Honor?

THE COURT: We'll talk about post-trial submissions when you have finished putting on your evidence. We will arrange a schedule.

By the way, Mr. Walker, let me ask you, does that upset your handling of your case in any way, your not knowing whether that is received or not?

MR. WALKER: It conceivably could, but as I stand here now I don't believe that it does, your Honor.

THE COURT: All right. As I say, if I must rule right now I am going to exclude it. But if I have the leisure not to do that, I would rather postpone a final ruling to the end of the case, andI will assume that you are both able to manage with that, unless one of you tells me otherwise.

MR. WALKER: Thank you, your Honor.

Q Mr. Kellner, I now show you Plaintiff's Exhibit 4 which has been marked for identification. It's called a "Report of Vessel Casualty," dated 26 July 1972 and prepared

by Captain Jarrett, and ask you if that is a report that not only the Coast Guard, but also the company requires be prepared and filed following any sort of casualty involving a vessel.

A It is indeed a company requirement.

Q And it is also a Coast Guard requirement?

A Coast Guard requirement as well.

MR. WALKER: I offer this, your Honor, anew.

MR. BOWLES: Objection. The report again is a self-serving statement by the master of the Amoco Delaware. That gentleman has never been produced for cross examination.

THE COURT: When did Captain Jarrett die, Mr. Kellner?

THE WITNESS: Well, he had not been in our employ at the time but I believe it was, I guess a little over a year ago. I can find that date out.

MR. BOWLES: Your Honor, part of the problem here is there was a substantial delay, over a year and a half on commencing suit in the matter in question. Had suit been commenced sooner, perhaps the problem would not have occurred. The accident occurred in April, 1972, suit was not commenced until January of 1974.

THE COURT: Yes, I understand that.

MR. WALKER: There are reasons why it wasn't

commenced until it was, your Honor. There was an agreement between the parties that there will be testimony offered to this effect, that the Esso Connecticut interest would pay for the damages. That is why it wasn't commenced.

MR. BOWLES: Objection.

THE COURT: I don't think that has any bearing on whether the testimony of this captain should not in fairness have been taken or somehow preserved and, most importantly, subjected to cross examination, since, obviously, he is not a neutral party keeping neutral records in the ordinary course of business, but a master of a vessel having some interest in coming out as clean as he can from this episode, all of which explains why I would exclude both of these at this time, if I am pressed for a ruling, but, as I have said, I am leaving that open for you to persuade me that for some reason I am wrong. So I just wanted to know whether the death of the captain had come so quickly after the casualty that this might explain the failure to have him deposed. But why don't you proceed, Mr. Walker.

I have the same ruling on Exhibit 4 for identification. It's excluded at this time with the understanding that if plaintiff persuades me that that is an erroneous ruling I will change the ruling in the course of deciding the case.

MR. WALKER: I'd like to have this marked for

identification, please.

xxx (Plaintiff's Exhibit 8 marked for identification.)

MR. WALKER: Plaintiff's Exhibit 8 marked for identification is the bill and survey report pertaining to the damage sustained by the Amoco Delaware on April 13, 1972.

Q I show you this, Mr. Kellner, and ask you if this is the bill pertaining to the damages and whether or not it was paid by Amoco or on behalf of Amoco Shipping?

MR. BOWLES: Your Honor, this is a bill for certain repair work that was performed on the ship. I don't believe it's been established that the damages were in any way related to this accident, at this time.

A That's correct, it is.

MR. WALKER: I offer this, your Honor.

MR. BOWLES: Objection, your Honor.

THE COURT: What's your answer to that objection, Mr. Walker?

MR. WALKER: It sets out the repairs that were done as a result of the damage sustained when the vessel came in contact with the Esso Connecticut on April 13, 1972.

THE COURT: How is that connection shown by the evidence now before me, that these repairs were of damages resulting from that collision?

MR. WALKER: Mr. Kellner just testified to it.

THE COURT: Objection sustained. His testimony doesn't teach me that whatever was done there resulted from the bumping together of the Connecticut and the Amoco Delaware.

MR. WALKER: Your Honor, the testimony of -- the transcripts I offered into evidence earlier of Mr. Klaveness describes the starboard side shell plating damage that was done. This bill and survey report, which, incidentally, is signed by a Humble Oil Company representative, discusses the same damages and indicates the cost of repairing.

MR. BOWLES: Your Honor, that is signed without prejudice. The Humble representative was not on board ship and certainly is not committing Humble to the fact that these repairs were in any way related to this accident. As far as the deposition of Mr. Klaveness is concerned, if the deposition shows that, I don't know where it is and I would ask Mr. Walker to please read that particular portion into the record, if it exists. I don't believe it does, your Honor. Mr. Klaveness was not a witness to the damages, I don't believe.

THE COURT: The very simple proposition is that you have got to show somewhere in this evidence a connection between those repairs and the damage to the vessel from the incident that we are talking about in this case. Your adversary says that Mr. Klaveness' deposition doesn't do that, and, of

course, I don't know whether it does or not. So now it's your turn to tell me where it does that, if it does.

MR. WALKER: I will try to find that in the transcript, your Honor. Meanwhile, even the testimony of Mr. Bondy, the mate and pilot of the Esso Connecicut conceded that in his report that there were indentures to the Amoco Delaware on the starboard side in the way of the fending. I will offer his accident report for that purpose at this time.

MR. BOWLES: Your Honor, I have no objection to offering the accident report into evidence but, again, I think if it says what Mr. Walker says, he should read it out. It does not say that, sir.

THE COURT: Okay. First, you have no objection to this accident report?

MR. BOWLES: Not being admitted into evidence, no, your Honor.

THE COURT: All right.

xxx (Plaintiff's Exhibit 9 received in evidence.)

THE COURT: Now, since I have not read it, Mr. Walker, tell me where it says what you said it says.

MR. WALKER: 7a, your Honor, on the first page.

MR. BOWLES: You will find, your Honor, that that refers to our unit, referring to the Esso Connecticut, which

did suffer some minor damage. 7b refers to other vessel or property, which I assume means the Amoco Delaware.

MR. WALKER: 7b, I'm sorry, your Honor. My glasses weren't quite good enough there. 7b.

(Pause)

MR. BOWLES: Which simply states, your Honor --

THE COURT: I can read it, with trouble. It won't do, Mr. Walker.

MR.BOWLES: I would go further on that point, that Mr. Bondy testified specifically that he could find no damage to the Amoco Delaware. That is at page 28 of his deposition, lines 19 through 23.

THE COURT: Mr. Walker, I must say, there is an obviously essential link in whatever case you were supposed to be making for the admissibility of Plaintiff's Exhibit 8, and I believe the Court has a right to expect that you'd be ready with this, rather than have me sit here while somebody rifles through a deposition to find that link.

MR. WALKER: Your Honor, as your Honor is aware, in light of our application last week, the man who was on the scene is out of the country. He was in Japan and he was detained a week and that was the reason why we requested a one week adjournment of this trial. Unfortunately, he is not available. He would have been perfect for the job of doing

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to show that they are related to this particular alleged casualty.

THE COURT: Mr. Walker?

MR. WALKER: Perhaps I should ask the witness a few other questions, your Honor.

THE COURT: Mr. Kellner, have I been told your position with Amoco?

THE WITNESS: Supervisor of Marine Operations.

THE COURT: You may go ahead and interrogate.

Q The main purpose of going into the shipyard, this was a new ship and it was to accomplish what we call the guarantee work, is that correct?

A Yes.

Q But with respect to this damage -- what was the bulk of this guarantee work, what did that have to do with?

A I believe it was the tank coating of the vessel, the tank coating failure of the vessel.

Q That did not necessitate dry docking, did it?

A No.

Q But the repair or the replacement of side shell plates as outlined in Exhibit 8 did, in fact, necessitate dry docking, is that correct?

A Definitely so --

MR. BOWLES: Objection, your Honor.

* * *

* * *

take a period of time longer than the alleged collision repairs you cannot get a proration in any event. The ship was in the shipyard for a major purpose and as Mr. Walker has indicated the coating work, and the invoices show very substantial other work, to the engine room, to the engines, to the propeller, the rudder, et cetera. Anything he did on this accident would be very minor and incidental.

THE COURT: Having in mind how little of your time at your rates should be devoted to $200, I will receive it for what it's worth, with the observation to Mr. Walker that I don't think it's worth much.

MR. BOWLES: I object to commenting on the other document, that the ship went into the shipyard not for that alleged accident.

THE COURT: You are talking about Exhibit 11?

MR. BOWLES: Yes, your Honor.

THE COURT: I will receive them both and you can argue in post-trial memos what they amount to.

(Plaintiff's Exhibits 11 and 12 received in evidence.)

xxx

MR. WALKER: I have nothing further at this time.

CROSS EXAMINATION

BY MR. BOWLES:

Q You testified, sir, that the ship required dry

docking for this particular repair. You are aware, I'm sure from your experience that for hull repairs, whether or not the ship requires dry docking depends on what level along the side of the ship those repairs are necessary, is that correct?

A That's correct.

Q If the repairs are high enough above the waterline the shipyard can make those repairs afloat, isn't that correct?

A Yes.

Q What's the depth along the side of the Amoco Delaware?

A You are asking --

Q From her main deck to her keel.

A I would say approximately 50 feet.

Q How far down from your main deck were these indentations that allegedly needed repair; do you know?

A I don't know exactly, no.

Q Do you know what her draft would have been at the shipyard?

A I would say approximately 30 feet.

Q That is her loaded draft, sir, isn't it?

A Her loaded draft is about 36 feet.

Q What's her light draft?

A Maybe about 28, 26.

Q How about empty and ballasted, in ballast, when it went to a shipyard --

MR. WALKER: Do you mean ballast or empty?

Q I'm sorry. Sufficient to go to a dry dock.

A I would say about 25 feet, 26 feet.

Q Couldn't be more like ten feet?

A Well, there is a possibility, a little less than that.

Q What was her draft when she entered the shipyard?

A I don't know that.

MR. BOWLES: Mr. Walker, may I have the log books of the Amoco Delaware, please, the day she entered the shipyard.

(Pause)

Q I show you the log page of the Amoco Delaware for Saturday, July 22, 1972. Does that record the drafts of the Amoco Delaware at the shipyard, sir?

(Pause)

Q I am pointing to it, sir.

A I know where the drafts are. I am just reading the remarks over there.

Q Would you read the drafts please?

A For 8/3/, aft, 12-6.

Q And the mean draft is?

A Forward draft is 8-3.

Q The mean draft?

A No listed mean draft here.

Q Can you calculate that?

A No.

Q You don't know how to calculate mean draft?

A I can, but I don't wish to.

Q You refuse to?

THE COURT: What do you mean, you don't wish to?

THE WITNESS: I don't know how to do it.

THE COURT: You said you could, but do not know how?

THE WITNESS: Right.

Q The mean draft is found by taking the average of the forward draft and the aft draft, is that right?

A That's right.

Q Would approximately ten feet three be the mean draft here?

A Sounds right.

Q So in other words, her mean draft going into the shipyard was ten feet three inches on this occasion, is that right?

A Right.

Q Do you know whether these damaged plates were

above the waterline or below the waterline?

A I didn't handle the ship in the yard, I don't know.

MR. BOWLES: I submit that all testimony regarding the need for dry docking from this witness should be stricken, your Honor.

THE COURT: Mr. Walker?

MR. WALKER: I don't see that that follows, your Honor. We know that H. and J. strakes were repaired. The mere fact that he doesn't know where J. and H. strakes are doesn't render all of his testimony annullity.

THE COURT: Who does know?

MR. WALKER: Mr. Bysarovich knows, who is on the West Coast. Certainly we could get an engineer up here within an hour to --

THE COURT: Well, you have about an hour. But the question is whether to strike Mr Kellner's testimony and the answer is it is stricken, and so are Exhibits 11 and 12, and I don't want to hear any testimony like this, Mr. Walker, of somebody who just idly speculates about things concerning which he has no knowledge, and gives me numbers that he just takes out of his head like 30 feet draft, when perfectly available records of his own company promptly show that they are ten feet. Let us try to see that this doesn't

happen any more in this or any other lawsuit where I am presiding. Exhibits 11 and 12 are stricken at this time subject to later rulings if we have a better foundation laid for them.

Is there any further cross examination of this witness?

MR. BOWLES: No, your Honor.

THE COURT: Do you have any redirect?

MR. WALKER: No, your Honor.

THE COURT: You are excused.

(Witness Excused)

THE COURT: Call your next witness, please.

MR. WALKER: Captain Kingston, please.

R O B E R T K I N G S T O N, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALKER:

Q Captain Kingston, did you at my request review the testimony of Mr. Bondy and Mr. Klaveness?

A Yes, I did.

Q Did you at my request review also the Coast Guard report filed by the Esso Connecticut?

A Yes, I did.

* * *

* * *

Q And did you also review the log book of the Amoco Delaware for April 13, 1974?

A Yes, sir.

Q Before we proceed to get into the details of this matter, would you tell his Honor a little bit about your background, your maritime background?

A I started to sea in 1934. In 1934 to 1936 I sailed dry cargo ships and in 1936 I joined the Standard Oil Marine Department of the Standard Oil Company New Jersey, which later turned to Esso. And I sailed with them from ordinary seaman to master. I left them in 1945 and then sailed as master for Keystone Shipping Company, primarily a tanker company, until 1947. I came ashore in '47 and managed -- I didn't manage, I was assistant port captain for some thirteen tankers, eleven of which were bare boat chartered by Esso, and then in '51 I went to work with Hess, Inc., as port captain of their marine department. I stayed there four years. And I have been with one small owner, single ship operation for a year in '56, and then went -- I'm sorry, not a year, four years. 42 months, to be precise. Then went with A.L. Burbank Company in New York and I am still there, from 1960 to now. I handle tankers, dry cargo ships and agency ships. That is about it.

Q Thank you, Captain.

* * *

* * *

I may ask you to do that. If I don't let him put in parol evidence or if he refrains from putting in parol evidence, do you intend to put any in if Mr. Walker refrains from putting on parol evidence, do you intend to put any on?

MR. BOWLES: I intend to put a charter expert on for the meaning of the clause, your Honor. Primarily to answer the arguments he has raised in his legal memorandum --

THE COURT: But if he doesn't put in any parol evidence, you would propose to put some in anyhow, is that what you mean to say?

MR. BOWLES: Yes, your Honor.

THE COURT: Then why don't you proceed, Mr. Walker.

BY MR. WALKER:

Q Captain Kingston, I refer you to this Clause 9, maybe that is a little difficult to read because it isn't too good. We have it set out, I believe, in the pretrial order.

A I can read most of it.

Q Here this is. This is very easy to read. We have stipulated that that is the clause, so there isn't any difficulty with that.

Referring to that pretrial order, would you just direct your answers to the questions I am about to ask you now to that clause and your understanding over the years of what that clause means.

The lighterage aspect, is that an accommodation to the owner or is that an accommodation to the charterer?

A It would be an accommodation to the charterer. It's at the direction of the charterer.

Q Why is that?

A Because they must bring the ship to a safe berth for discharging. It might be for convenience of distribution of the products on board to the charterer. Either one of those two reasons.

Q Could this ship have gone into Port Jefferson Harbor without the necessity of stopping to lighter?

A I understand that the draft of the vessel on arrival was 32 feet something forward -- or aft, rather, and 33 feet forward. She was by the head, I believe. And that the channel depth at Port Jefferson -- you have the precise figure -- is well under that. In other words, it's less than 30 feet.

Q So she couldn't have lay safely afloat in Port Jefferson Harbor?

A She couldn't have entered Port Jefferson Harbor without going aground.

Q Maybe we can agree that this harbor chart of Port Jefferson would help the Court if we put it in.

THE COURT: Do I need a chart? I thought one of the things that was not disputed in this case is it couldn't

with the draft it had go beyond the lighterage point and that the lighters were necessary. Is that disputed?

MR. BOWLES: No, your Honor.

THE COURT: What's the problem, Mr. Walker?

MR. WALKER: There isn't any problem. I thought it might be helpful to your Honor to look at it, just to visualize.

THE COURT: Actually, looking at charts don't help me very much, even when I need them. If you can't show me some reason why I need them, I don't want it.

MR. WALKER: I won't offer it. It is agreed that it was necessary to lighten ship in order to get into Port Jefferson.

MR. BOWLES: That has been stipulated, Mr. Walker.

Q Captain Kingston, does or does not a ship owner have the right to refuse to go into a harbor that is of such a draft that his vessel cannot always remain safely afloat?

A Yes, he does.

Q Under this charter party?

A Yes, he does.

Q When it is necessary to lighter to accommodate the charterer, what is the cost to him and practice with respect to any damage that flows from such lightering, such as is alleged here in this case?

MR. BOWLES: Your Honor, that is awfully broad and vague.

THE COURT: Sustained.

Q Who is responsible for the expense of any damage caused by the lightering?

THE COURT: That is supposed to be my job, and with all deference to the captain I'm not going to allow a question like that. If he's had experience with this, concrete experience, being a little bit flexible about the rules of law governing parole evidence, I will let him tell about it. But I'm not going to let him sit here and construe this clause, because I don't think that is appropriate. That is a legal question.

A I actually have had --

THE COURT: There is no question before you at the moment, Captain.

THE WITNESS: I wanted to answer your question.

THE COURT: I didn't ask you any question.

Mr. Walker, you may ask some other question.

Q With respect to the custom and practice of providing fenders, Captain Kingston, in a lightering operation of this sort between the Amoco Delaware and the Esso Connecticut whose responsibility is it to provide these fenders? What is the custom and practice with respect to providing them, I

should say.

A The custom and practice is that the lighter provides them.

Q Just as they did in this case?

A That's correct.

Q Is there any custom and practice that vessels like the Amoco Delaware, a 27,000 ton vessel, vessels of that order, is there any custom and practice that they carry fenders in today's New York market?

A In today's period and time, and I'd say for the last ten years, the answer is no, it's not been the custom. Prior to that it used to be. But it was done prior to that for special purposes like wartime, the requirements of one large vessel going alongside.

THE COURT: You have answered. Go ahead.

Q With respect to putting out fenders such as the Esso Connecticut did in this case, is it good seamenship or is it the custom and practice to put them out all at the same height or staggered heights below the main deck of a vessel like the Connecticut?

A In my opinion, that would be that it would depend upon the circumstances at the time of the transfer between the liner and the vessel.

Q Under the circumstances that existed in this case,

according to the documents you read, the log book and the testimony, how would in your opinion these fenders should have been rigged?

A I would believe that they should have been rigged at varying levels on the sheer strake, top strake, and then down further at varying heights to fend one vessel off from the other in case they roll. There was a sea running of approximately, in the testimony, of approximately three to four feet.

Q Is this unusual? Was there anything unusual about the weather conditions that you read from any of these documents on the day in question?

A No, there was moderate seas and about a force four wind, which you find in one section and then in the testimony, on the depositions it stated that it dropped to zero. No, I'd say it was not extraordinary weather for lighter.

Q Do you recall that during the incident of April 13, '72, several, I think four of these fenders carried away?

A Yes, that's correct.

Q And they were later replaced, do you recall that? Certain of them were replaced?

A That's right. The numbers in both instances varied depending on who was writing about it.

Q I think three and four is the number that carried

away and then they replaced certain of them?

A That's correct.

Q You will recall that all of this took place within a period of about twelve minutes?

A That's correct.

Q Do you recall also that certain of the mooring lines carried away?

A Yes.

Q And certain of the mooring lines were thereafter replaced?

A That's correct.

Q These were the mooring lines of the Connecticut and they were replaced by personnel aboard the Connecticut, is that correct?

A That's correct.

Q Under the circumstances and other bases of what you have read with respect to the fenders carrying away and more mooring lines having been put out and more fenders having been put out, do you have an opinion as to how this contacting or damage that was sustained by the Delaware could have been avoided?

A It would have been difficult within the time period because the time period was so short. When the Connecticut, according to the deposition of the mate pilot

on board the Amoco Delaware, when the Connecticut began to roll, it was a question of time and nothing was done until the vessel struck, according to both depositions, nothing was done. And then when the fenders carried away, evidently they thought that putting more fenders out and running more lines would solve the problem. That is the action they took.

Q In your opinion, were the fenders defective?

MR. BOWLES: I object.

A My guess is I don't know. I can't guess. I would say that --

THE COURT: Okay. Next question.

Q Let's put it this way: If they were not defective, let's assume that they were not defective and let's assume that they carried away while being used in the normal expected way, then was there any point to putting out more fenders?

A Yes.

Q For what reason?

A To prevent damage, even while -- if they had another course of action in mind they would still try to do it to prevent immediate damage.

Q But once the fenders carried away, assuming they weren't defective, what should the Esso Connecticut have done, if anything?

A I would say try to get away.

Q But instead of that, the Esso Connecticut put out more mooring lines and more fenders, is that right?

A That's correct.

Q Is there any evidence that the mooring lines were defective?

A Not to my knowledge. Nobody said they were.

Q They did carry away?

A Yes.

Q Would that indicate then that putting out more mooring lines would not have helped?

A No, the cause of the failure of the lines was probably that they were very tight when she started to roll, put too great a stress on. Putting out more might have solved the problem by not taking them up quite so tight.

Q But did it, in fact?

A No.

Q There is some dispute about which way the vessel swung to the tide, as you will recall from reading the testimony --

MR. BOWLES: Object to the leading, your Honor.

MR. WALKER: I am stating that this is a fact and I think we can agree that there is a dispute as to which way the vessel swung.

MR. BOWLES: I don't agree with that.

el/lf Kingston-Direct

THE COURT: Why don't you just ask him a question.

Q Assuming that the vessel swung from a westerly heading to an easterly heading with her stern passing through the north, would that be an unexpected thing, in your view, an unexpected maneuver in your view as a mariner?

MR. BOWLES: Objection, your Honor. I don't believe there is sufficient conditions stated in this attempt at that hypotnetical question to make any sense out of it. We know that there are facts about the tide and the wind which are not included here. I don't know that he is asking the witness to assume them or not. In fact, the ship did not swing in the direction that Mr. Walker states.

THE COURT: Whatever way it swung and I don't know about that, I don't think it an acceptable hypothetical. I don't know how the captain can answer that.

MR. WALKER: I will fill in some details. I was doing it to save time, your Honor. He's read these records.

Q Assume with me, if you will, Captain Kingston, that there was an east-southeasterly wind blowing of about fifteen or sixteen knots. Assume further that the vessel was riding to her port anchor and heading roughly westerly, and assume that there was an easterly swell of three or four feet, and assume that the tide changed in Long Island Sound off Port Jefferson and the vessel began to swing to the tide.

Let me first ask you, in your opinion, would it make any difference whether the vessel swung through with her stern through the north or she swung to the tide with her stern swinging through the south? Would it make any difference?

A It would make a difference perhaps in results, but it all depends what viewpoint you are taking. If you are taking it from the point of view of the Amoco Delaware, no, it doesn't make any difference.

Q In other words, there weren't any ships with which the Amoco Delaware could come into collision by swinging north or swinging through the south, is that right?

A That's correct.

Q Is it true also that there was a barge alongside the port side of the Amoco Delaware as well as a barge along the starboard side of the Amoco Delaware?

MR. BOWLES: Objection, your Honor, that is leading and that is an improper statement of the facts, also. The Amoco Delaware's log book shows that another barge did come alongside to port at about 1730. I think that is the problem with the statement as to when this occurred.

MR. WALKER: Well, that's right.

MR. BOWLES: Which was not stated in the question.

MR. WALKER: I asked him to assume that there was a barge along the port side.

MR. BOWLES: At what point, sir?

MR. WALKER: At 1730.

THE COURT: When did the accident happen?

MR. WALKER: It happened, according to Mr. Bondy, sometime between 1723 and 1735.

MR. BOWL: His own witness, Mr. Klaveness, has after 1730, your Honor.

MR. WALKER: I will accept that.

THE COURT: Okay. After 1730.

Q In any case, at 1730 and thereafter until the Esso Connecticut departed from Long Island, the Amoco Delaware, there was a barge on either side of the Amoco Delaware, is that correct?

A That's correct.

Q Would there have been any practical reason why the Amoco Delaware should have attempted, if indeed she could have, to have her stern swing through the north as opposed to the south?

A I don't know of any reason why it makes any difference.

Q Of course when she swings to the tide she does at some point in time expose one side or the other to this easterly swell, is that correct?

A That's correct.

Q Of course if she swings to the north she exposes her port side to the easterly swell and if she swings to the south, she exposes her starboard side to the easterly swell?

A That's correct.

Q It follows then that she exposes the Esso Connecticut to the swell if she swings through the north and if she swings through the south which would expose the Poling Bros. self-propelled barge to the easterly swell?

A That's correct.

Q Is there any custom and practice under these circumstances so far as you know to make any effort on the part of a ship the size of the Amoco Delaware to swing one way or the other when swinging to the tide under the circumstances in this case?

MR. BOWLES: Your Honor, I think that hypothetical should state sufficient facts as to when the swing commenced with the change of the tide vis-a-vis the second barge coming along. The evidence is, in fact, that the Amoco Delaware commenced swinging sometime, I believe, between 1700 and 1715 before this other barge came alongside. In that case, there would have only been one barge alongside when the swing would have commenced and it would make a material difference in the captain's answer as to whether the ship should do something

to make sure she swings in one direction or the other.

THE COURT: What do you say to that?

MR. WALKER: I say, your Honor, that we have to assume the facts we have. We don't know exactly how much of the swing had taken place. We can only assume from the circumstantial evidence, that is that the fact that the barge Esso Connecticut started rolling sometime around 1723 and inflicted damage sometime after 1730, that at that point in time she must have been halfway through her swing, whichever way she swung.

THE COURT: I'm not much a seaman, I just sit around here mostly on dry land, but I must say it is most unpersuasive for you to tell me this we have to assume when you have the burden of proving a claim here. I'm not going to assume facts of the kind you just talked about. There are lots of things that make ships start to swing, I gather, and I assume this ship started to swing and performed a swing of a certain number of degrees at certain times and that that is knowable and that somebody ought to be able to tell us that. If you are going to ask hypothetical questions that assume something that may or may not be true they are not going to be helpful to me.

MR. BOWLES: If I may add to that, the one document which would show us when the ship began to swing, the

course recorder type of the Amoco Delaware, was demanded but has not been produced. Rather than having stipulation as to when the ship started swing'ng with the change of the tide, we should have that document but, unfortunately, it hasn't been produced.

THE COURT: I don't know about that. I don't know of any motions that have been made before me to compel production of that. But in any event for your guidance, Mr. Walker, I tell you that the kinds of things that you have just indicated we have to assume I am unlikely to assume and if the witness' testimony rests on such assumptions it's not going to be very valuable testimony.

MR. WALKER: I will approach it from another angle, your Honor.

Q The record clearly states that -- and I think we have agreed now, that the damage occurred sometime between 5:30 and 5:35.

THE COURT: 1530?

MR. WALKER: No, 1730 and 1735.

THE COURT: Is that agreed, Mr. Bowles?

MR. BOWLES: I don't agree that any damage occurred at all to the Amoco Delaware, your Honor. I want to make that completely clear. The ships were rolling, commenced rolling with a heavier degree at about 1730, your Honor.

THE COURT: Okay.

Q Assuming that the vessels were rolling, not the vessels, the vessel, the Esso Connecticut was the only vessel to roll, as far as the testimony, assuming that the Esso Connecticut started rolling at 1730, would that suggest to you that she was then exposed to this easterly swell or not?

A Yes, it would.

Q At that time the Poling Brothers' vessel was made fast along the port side or the other side of the Amoco Delaware, is that correct, at 1730?

A Yes, at 1730, yes.

Q This business of deciding where the Poling Brothers' vessel was to be made fast was decided well before that time, is that true in your experience?

MR. BOWLES: Objection.

A He can only go on one side. The other side is busy.

THE COURT: What was your objection?

MR. BOWLES: I'm sorry. Perhaps I didn't understand the question.

(Question read)

A Yes, because there is only one side of the ship open and they decided to lighter the ship with the Poling Brothers' barge.

MR. BOWLES: I'm sorry, I thought, I assume he said

* * *

at Port Jefferson.

THE COURT: Does that affect your question?

MR. WALKER: No.

Q And do you also recall that both the mate and the master of the Esso Connecticut had Port Jefferson pilotage and had a great deal of experience lightening ships at Port Jefferson?

A Yes.

MR. BOWLES: I'm not sure that is the testimony either, Mr. Walker.

MR. WALKER: I believe it is. But we can assume that for purposes of my questions.

Q With these two facts in mind, these two sets of facts with respect to the relative experience -- relatively little experience on the part of the Amoco Delaware and relatively vast experience on the part of the officers of the Esso Connecticut, would you in your opinion have expected the master or mate of the Amoco Delaware to have prepared his ship, the Amoco Delaware, to maneuver when the vessel swung to the tide?

A No.

Q Going back to this swing of the ship at anchor, assuming an east southeasterly wind and a westerly heading and an easterly swell, is there any way of accurately predicting

which way the vessel would swing, that is, whether the stern through the north or through the south?

A I don't believe there is an accurate way of predicting it, no.

Q And you testified earlier that in your opinion there wasn't any reason to be concerned whether she swung one way or the other, is that right?

A That's correct.

MR. WALKER: I don't believe I have anything further at this time, your Honor.

THE COURT: Why don't we take ten minutes and we will go on with the cross examination.

(Recess)

CROSS EXAMINATION

BY MR. BOWLES:

Q Captain Kingston, have you been the master of a ship when it's under voyage chart?

A Yes, sir.

Q Many times?

A Many.

Q You have read the testimony of Mr. Klaveness?

A Yes.

Q He had no objections to the number of fenders or the placing of those fenders alongside the Esso Connecticut,

did he?

A That's correct.

Q He had no objections or criticism of the lines of the vessel at any time?

A That's correct.

Q And, in fact, even when the ship began rolling he had no criticism, is that correct?

A That's correct.

Q A ship officer or master, let's say the watch officer, if you have a lighter coming alongside you have a duty to see how those are tied up together, don't you? To prevent damage to yourself?

A Oh, yes.

Q And if you have an objection to the number of fenders or placing of fenders, the officer or master of the vessel should state that, shouldn't he?

A Yes.

Q And if he has an objection to a vessel staying alongside because of weather conditions or rolling conditions, he has a duty to tell that vessel to go away or take other precautions to prevent damage to himself?

A I would say yes.

Q Did you ever have occasions where you demanded more fenders of a lightering vessel alongside?

A No, sir.

Q Did you ever ask a vessel to break away from your side because it was not safe to remain alongside?

A No, I never found it necessary.

Q If you had asked it, you would certainly expect that action to occur, either more fenders or leave the side?

A Yes, we would have agreed.

Q The ship master on the scene is the best person to judge the condition of the weather and so on, as opposed to the charterer, say, at his office?

A Oh, yes.

Q A ship master on the scene has a duty to keep a good lookout on the weather conditions?

A Yes.

Q The tidal conditions?

A Yes.

Q And do everything he can to prevent damage to his own ship, isn't that correct?

A That's correct.

Q Regardless of whether it's on charter or not?

A Certainly.

Q You don't sit and watch damage occur and then yell to the charterer, do you?

Q You stop it if you can?

A Certainly.

Q It's desirable for a lightering vessel to be in a lee, is that correct?

A Yes, of course.

Q And why is that?

A It may prevent damage to the two vessels.

Q That's correct. And you said before that the swinging of the Amoco Delaware on her anchor didn't make any difference to her which way she swung her stern, to the south or to the north, is that correct?

A That's correct.

Q It would make a difference to the Esso Connecticut, couldn't it?

A It might.

Q It did, in this case.

A It did, in this case.

Q What happened was that as the ship swung her stern -- which way did she actually swing her stern? She went to the south, didn't she?

A I don't know. I read both the depositions and I was never clear in my mind which way she actually swung.

Q She swung her stern to port, didn't she?

A Captain Jarrett's report said that she did not

swing as anticipated and she swung to port.

Q Mr. Klaveness said the same thing, didn't he?

A Yes, but he didn't say stern or bow. It's confusing.

Q Mr. Klaveness didn't even know which direction he was heading at the time, did he?

A I don't recall.

Q And we don't have the course recorder to see what her compass heading was, do we?

A No. The preliminary indication from both depositions was she was in a general westerly heading, actually about 281.

Q You have never seen the course recorder, have you?

A No.

Q That would help to narrow that down?

A It would, yes.

Q Assuming she were heading in a westerly direction, she would be heading into the ebb current, is that correct?

A That's correct.

Q And if she swung her stern to port she would bring her stern through the south?

A If the stern went to port, she would go through the south, that's correct.

Q That would place the Esso Connecticut on the easterly side then of the Amoco Delaware and she would be in a situation where she would be subject to the action of the waves?

A That's correct.

Q And that is what, in fact, did occur?

A Yes.

Q You said there was no accurate way to predict which way a vessel at anchor is going to swing, is that correct?

A That's correct.

Q Regardless of whether you can predict it precisely, can't a ship's master take action with his engine and/or rudder to give the ship a kick to start her swinging one way or another?

A Yes.

Q Of course, nothing was done like that here.

A No.

Q There has also been some testimony of a second barge coming alongside. Who decides which side a vessel, a lightering vessel is going to go alongside?

A Generally the lighter.

Q Do you recall the testimony here --

A Although there was testimony, it was implied at least that the captain of the Amoco Delaware put it, or asked

them to go into the starboard side.

Q She was in a lee at that time when the Esso Connecticut first went alongside?

A That's correct.

Q Suppose the Amoco Delaware master or officers had used her engine and rudder to make the Amoco Delaware swing with her stern to starboard going through the north, the Esso Connecticut would have been in a lee when she went into the trough of the waves?

A That's correct.

Q And the reason she has a lee is that the Amoco Delaware is something over 600 feet long and 50 feet deep, she is like a large breakwater for a small vessel like the Esso Connecticut.

A That's correct.

Q The Amoco Delaware didn't even roll in this wave, did she?

A No.

Q So it really makes a difference which way she swings to the lightering vessel alongside?

A That's correct.

Q Simply by delaying the other barge coming alongside until she had steadied down into her new heading on the flood current there would have been no damage to either barge,

is that correct?

A Had that been done, it's quite probable there would not have, though I don't know.

Q You found no evidence that the other barge suffered any damage whatsoever, did you?

A No.

Q There is certainly nothing in the log books or reports or the testimony that you have come in contact with?

A That's correct.

Q So the Poling vessel on the port side of the Amoco Delaware and with her stern swinging through the south, the Poling vessel being the other barge, she was in the lee, is that correct?

A Yes.

Q Did it appear to you that this rolling came up quite suddenly?

A Yes.

Q As soon as it came up the people on the Esso Connecticut took action to put out additional fenders and then broke away quite promptly?

A Yes, they did well.

Q The Esso Connecticut could not get away from alongside the Amoco Delaware until the pumping on the Delaware stopped?

A That's correct.

Q In other words, the Delaware is pumping products into the Esso Connecticut, the Delaware's pumps are being used and those on the Delaware are controlling those pumps?

A Yes.

Q All correct?

A All correct.

Q Is it a matter of judgment by the seamen on the scene, isn't it, as to when to break away in a situation like this when they can no longer safely stay alongside?

A Yes, on the part of both vessels.

Q On the part of both vessels?

A Yes.

Q Because those on the Amoco could certainly at any time tell the Esso Connecticut to get away, they didn't say it was safe to continue?

A They could, or the lighter could elect to go.

Q It's a matter of judgment on both parts?

A Yes.

Q We have basically a common undertaking also, don't we, between the two vessels, one to deliver products and the other to receive it?

A Yes.

Q And it's desirable for the lightering vessel,

the barge in this case, to stay alongside as long as possible to facilitate this mutual operation?

A I would say so.

Q As we said before, it's a matter of judgment as to precisely when it might have to break off. It's a very unusual thing to break off operations, isn't it?

A Not really.

Q It happens, doesn't it?

A It happens.

Q Have you ever worked for Amoco?

A No.

Q Do you have any knowledge as to whether any other Amoco ships have lightered at Port Jefferson?

A I don't know from personal knowledge.

Q There is nothing in the record that you saw where the master of the Amoco Delaware called this an unsafe port, called Port Jefferson an unsafe port?

A No.

Q And there is nothing in there where he called the berth an unsafe berth?

A No.

Q In fact, it was not unsafe, was it, in your opinion?

A The anchorage is certainly not unsafe.

Q And the berth?

A The berth, after lightering, was as far as I know all right. They had no problem afterward.

Q That's right, it might be a temporary condition where this rolling was too heavy to continue operations?

A This is at anchorage.

Q Right, when the Esso Connecticut was alongside and she had to break away, was a temporary condition?

A Yes, obviously.

Q And as soon as the Amoco Delaware settled down to her new heading on the flood current, heading easterly, I assume, the Esso Connecticut went back alongside and completed operations?

A About an hour later, yes.

Q And they had no further trouble?

A Not to my knowledge, no.

Q If you were the master of the Amoco Delaware and saw a barge described as violently slamming alongside, wouldn't you have chased her away?

A Yes.

Q Sooner than the master of the Amoco Delaware did, apparently, here?

A No, because the time interval between the first time the vessels made contact until she actually got away, was not an unreasonable time for what was done. In other words,

they made an attempt to put out fenders to prevent any further contact between the vessels. They tried to resecure hoping that they could control this. There was a fair chance that they could do this. It doesn't work. So it was bad judgment perhaps on the part of the Connecticut. But to try, maybe they should have just decided to go.

Q The people on the Amoco could have told her to go sooner, if they had a different judgment?

A Yes.

Q The action of putting out additional fenders is not unreasonable under the circumstances?

A No. It's worth a try.

Q The problem here really is we had a rolling condition develop very suddenly, the people took action to ameliorate it, and then broke loose, is that correct?

A Yes.

MR. BOWLES: No further questions.

REDIRECT EXAMINATION

BY MR. WALKER:

Q Who would be better able to predict the rolling with a three foot easterly swell on the part of the Esso Connecticut than the master and mate of that vessel?

MR. BOWLES: Objection, your Honor. We don't know anything about the experience of Captain Jarrett on the

Amoco Delaware in gauging rolling of barges at any port with a three foot swell.

THE COURT: What's your question, whether their knowledge of this lighter made them better able to predict?

MR. WALKER: As between Captain Jarrett on the Amoco Delaware and the captain of the Esso Connecticut, who engages in lightering at Port Jefferson on a regular basis and who is the master of the Esso Connecticut, he would be far and away better able to predict the rolling of the Esso Connecticut than would the master of the Amoco Delaware.

THE COURT: You have said that with such certainty that it hardly seems you need testimony on it.

MR. WALKER: I think it does follow, but I'd like to ask the question.

THE COURT: All right. You may answer.

A Yes, I would say that the lighter captain with his more experience and knowing his own vessel and knowing the condition, the loaded condition of his vessel, will vary, but he would be in a better position to judge.

Q Amoco Delaware, according to the testimony, didn't roll, is that right?

A That's correct.

Q If it did, then you could safely say, could you not, that the master of the Amoco Delaware should have predicted

that it would roll under the sea conditions that they met that day?

A Yes.

Q Have you ever in your experience used the ship's engines to direct the swing of a vessel at anchor in an open anchorage such as Port Jefferson?

A Not in a similar anchorage. I have done this at Stapleton anchorage.

Q Why and under what conditions?

A Because vessels anchor close together, sometimes too close, and they will swing in opposite directions to the same tide, sometimes. In other words, a vessel of shallow draft will swing in a different direction at possibly a different rate of swing than say a deep loaded vessel. A light will swing opposite and this could cause a collision. You use your engine to maneuver and keep away. You might even run up on your anchor chain or cause her to swing the other way.

Q The purpose of that would be to avoid another anchored vessel?

A That's correct.

Q In this case we had no other anchored vessel, is that correct?

A That is also correct.

* * *

DIRECT EXAMINATION

BY MR. WALKER:

Q Captain Kingston, on the basis of the testimony that you have heard and the documents you reviewed at my request which are in evidence here, do you have an opinion that you can state with a reasonable degree of certitude as to whether or not it was indicated on April 13, 1972, that the master of the Amoco Delaware should have taken some positive action to direct the swing of his ship to an anchor, to the anchor?

A No, sir.

Q I asked if you have an opinion.

A I have an opinion, yes.

Q What is that opinion?

A I don't think it was necessary to do this.

Q Was it indicated that he should have done it?

A No.

Q On the basis again of the testimony and the documents you reviewed at my request which are in evidence, is there any indication that it was imprudent to have taken alongside the Poling Brothers' barge at 1730 on April 13, 1972?

A No, and the proof of that is nothing happened.

Q In all your years of tanker experience, have you

ever found it necessary to maneuver your vessel which was at anchor and had a barge alongside when the tide changed and the vessel swung to the tide?

A Yes. This would occur in a narrow anchorage and it did happen at Stapleton, where my ship swung contrary to the way I anticipated it would and we were in danger of a collision with the other ship --

Q When you say another ship, you mean another anchored ship?

A Another anchored vessel close by and we swung in opposite directions and we just simply maneuvered to make our ship stay clear of that vessel.

Q In all your tanker experience, did you ever have occasion to do it when there wasn't any danger of running into another anchored ship, in other words, just to protect your ship or the barge alongside?

A No, the occasion never arose.

MR. WALKER: No further questions.

CROSS EXAMINATION

BY MR. BOWLES:

Q Captain Kingston, if the Amoco Delaware had swung the other way and kept the Esso Connecticut in the lee, isn't it obvious that this problem would not have arisen?

MR. WALKER: With respect to the Esso Connecticut,

you mean?

Q With respect to both vessels.

A To the Amoco Delaware and the Esso Connecticut?

MR. WALKER: As opposed to the Poling Brothers' vessel.

Q We are talking about the Amoco Delaware and the Esso Connecticut.

A Had it swung the other way it would have been better. In other words --

Q The Esso Connecticut would have been in the lee had the Amoco swung in the opposite direction?

A That's correct, yes.

Q And the likelihood of damage would be much less in that situation?

A Yes.

Q The Poling received no damage because she was on the lee side, is that correct?

A That's correct. Well, yes, I would assume that's correct.

Q Did you have occasions when you had barges alongside when the tide changed, when you were the master of a vessel?

A Oh, yes, definitely.

Q Did you ever have occasions where those vessels got into the trough and rolled, do you recall?

A Usually, and I'd say the answer is no, but usually my experience has been in more sheltered waters. In other words, Stapleton. Graves End because I experienced there where you could, but we swung the right way anyway.

Q I take it you have never lightered a vessel in Long Island Sound such as the Amoco Delaware?

A No, I have not.

THE COURT: What did you mean when you said you swung the right way anyway? Would the right way in this case have been --

THE WITNESS: The right way --

THE COURT: Listen. Would the right way in this case have been to swing so the Esso Connecticut was in the lee, vis-a-vis the Esso Connecticut? [sic, Amoco Del.]

THE WITNESS: Yes, sir.

THE COURT: You'd call that the right way?

THE WITNESS: Yes, sir. If there was only one barge alongside

THE COURT: I know.

Q I think we possibly covered this yesterday, and my recollection isn't firm on it. If the Amoco Delaware had swung with her stern to the north keeping the Esso Connecticut in the lee, would you think it prudent to hold off the Poling vessel until after the swing had commenced so the Poling would

not be in the trough either?

A If you had the decision to make I would agree with you. I'm not sure that at what stage the swing of the vessel was, you know, what stage of swing she had already made when the Poling Brothers' barge came alongside, or if she had even started to swing.

Q I think it clear from the record that the swing had been well underway by 1730 and the Esso Connecticut was exposed to the weather side and in the trough and had commenced rolling and the Poling, according to the log book of the Amoco Delaware, came alongside about 1730.

A I would believe that the master of the Poling Brothers' barge would not have come alongside on his own. I mean, he can deside this as well as anybody else.

Q You are assuming if the ship had gone the other way it would not come alongside in the trough?

A He might very well have decided to hang off.

Q That would be the prudent thing to do in that situation?

A I would say yes, because he was extremely light. He was empty.

MR. BOWLES: No further questions.

REDIRECT EXAMINATION

BY MR. WALKER:

Q Captain, when you say swing the right way and the wrong way, when you use these terms, I'd like for you to explain that.

A In this case when the tide became slack the wind such as it was on the port quarter, this would make this vessel, the Amoco Delaware, wind rode. It is probably why she swung through the south. The tide - I'm sorry now -- that is not correct.

She should have been wind rode by previous weather, just prior to swing, because the wind was fairly strong, according to the records, 16 to 21 knots on the port quarter. That would have brought her over so she would have swung through the north. That is what was anticipated, according to the deposition of Mr. Bondy. Wind died down, the tide was slightly on the starboard quarter and she swung through the north. This was unexpected, according to the same deposition --

MR. BOWLES: Excuse me. Swung through the south?

THE WITNESS: Swung through the south, excuse me. The time interval between the time she began to swing and the time at 1730 when this vessel began to roll, was relatively short and I think it would be a matter of judgment on the part of both masters, even in consultation, to decide whether to leave or to break off the operation and leave and come back. And I think the duty rests with both, as you asked me

yesterday.

Q What I want to clarify, Captain, is the use of these terms right and wrong.

A The right way, as I meant it before, is exactly what I told his Honor if you have a choice you would prefer to keep your lighter on the lee side of the vessel. If you have a choice. Now, in this case I don't believe you have a choice because you have two lighters.

THE COURT: Isn't it within the power of the captain of the Amoco Delaware if the Poling doesn't know better, to keep that other barge off while he finishes unloading onto the Esso Connecticut?

THE WITNESS: It would be within his power, yes.

THE COURT: Wouldn't it have made sense, since they had already started off loading into the barge?

THE WITNESS: It's very customary to put a lighter on each side and handle both of them.

THE COURT: I realize that, but you have told me that given the choice, the right way was to keep the Esso Connecticut on the lee side.

THE WITNESS: Yes.

THE COURT: And then you raised yourself the question whether the captain of the Amoco Delaware had a choice and I think now we have agreed that, of course, he did have a

choice.

THE WITNESS: I think it's a matter of judgment of both masters as to what they should do.

THE COURT: I understand that, but I am just trying to get straight, and I think I am straight, unless you correct me, that the captain of the large vessel had a choice here as to whether he was going to let the Poling barge come alongside or not.

THE WITNESS: I think he could have prevented it, but as a matter of practice he wouldn't, probably, if the master of the Poling vessel felt it safe, he would come alongside. And it proved to be all right.

Q Was there any reason for him not to let the Poling Brothers' barge come alongside?

A No.

Q And had the ship swung through the north the Poling barge would have been subject to the three foot swell, is that right?

A That's correct.

Q Which, if I understand your testimony, did the three foot swell and the wind condition as it existed indicate to -- does it indicate to you that any maneuver was indicated or needed or called for in the part of the Amoco Delaware?

A No, I don't think so.

MR. WALKER: That's all.

RECROSS EXAMINATION

BY MR. BOWLES:

Q Just a few further questions.

Only the Amoco Delaware can really control which way this flotilla would swing, is that correct, using her engines and rudder?

A If he wants to control it, yes, or felt it necessary.

Q Do you know when the tide actually changed here?

A No, I don't.

Q You heard Captain Christenson testify that when he came up at 1715 the Amoco Delaware had already commenced swinging with the tide.

A Yes.

Q And, of course, at that time the Poling was not yet aboard?

A That's right.

Q If the Amoco Delaware was going to take any action to control which way she was going to swing, she'd have to take it just about at the time of the change of the tide, is that correct?

A Well, you could do it later.

Q The best time, the optimum time --

A The easiest time would be at the change of tide when the flood had really got underway. Just getting underway would be the easiest time, yes.

Q Right, because the water is slack and just by turning the ruddder or a short kick on the engine you might get her to turn the stern and get her in the right direction?

A Yes.

Q Just about at slack water would be the right time?

A Yes.

Q And Poling was not alongside until 1730?

A That's right.

Q So that if the Amoco Delaware's master had taken action to swing his stern through the north, he would then simply wait until he came around to the flood current before bringing the Poling alongside, is that right?

MR. WALKER: Objection, your Honor. That is a gratuitous assumption on Mr. Bowles' part. In fact, they did make the Poling Brothers fast while the vessel was swinging, we know that. So there is no reason to believe that he would not have made it fast if she had swung the other way.

Q If you were the master of the Amoco Delaware and took action to swing through the north to keep the Esso Connecticut in the lee on your starboard side, would you attempt to bring the Poling alongside when she might be

in the trough at 1730?

A I would rely on the judgment of the master of the Poling Brothers' barge to decide whether he felt it safe. He is in a better position to determine this than I am.

Q It would be a mutual matter between you and him at that time?

A Exactly.

Q You'd have a question in your mind as to whether you'd order him alongside? You'd leave it up to him, in other words?

A I'd leave it to him --

MR. WALKER: Objection. There is no testimony that he could order him alongside. The testimony is quite the contrary, that the charterer ordered him, your Honor. There is not one word of testimony that Amoco Delaware could have ordered either barge alongside.

THE COURT: But it's clear that the captain of the ship could have ordered either barge away.

MR. WALKER: Away is different. But he said ordered alongside.

THE COURT: I don't think we ought to milk this excessively. Let's leave a little bit for imagination and speculation. I think we have exploited the captain sufficiently on direct, cross, redirect, recross.

MR. BOWLES: I agree, your Honor.

I have no further questions for Captain Kingston.

But referring to a statement made by Mr. Walker, the evidence of Mr. Klaveness is that it was the Amoco Delaware, the master of the Amoco Delaware which said which side, the starboard side of the Amoco Delaware that the Esso Connecticut would come alongside. That is the same context that I am talking about bringing the Poling alongside and the timing, et cetera, is up to the master of the ship.

THE COURT: Okay. But you are through questioning the captain?

MR. BOWLES: Yes, sir.

THE COURT: And you are through?

MR. WALKER: Yes, sir.

THE COURT: Thank you.

(Witness Excused)

MR. WALKER: I don't have any more evidence, your Honor, except I would like to point out some testimony in Exhibit 2 in evidence, the transcript of Captain Odd Klaveness, the chief officer of the Amoco Delaware with respect to the damage sustained. I couldn't find this yesterday in the heat of battle, if you will. On page 29, line 22:

"Q Prior to the time that the Esso Connecticut left the side of the Amoco Delaware, what steps did the Esso

* * *

studied with care, so when I deny your motion, as I am now doing, this is not necessarily a mature judgment that your motion will not eventually turn out to have been meritorious, but I'm going to take whatever evidence you have and decide the whole case based on the evidence from both sides. You may proceed, Mr. Bowles.

MR. BOWLES: Yes, your Honor. I call Mr. Stanley Christenson, please.

S T A N L E Y C H R I S T E N S O N, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOWLES:

Q Mr. Christenson, by whom are you employed, sir?

A Exxon Company U.S.A.

Q Where do you live?

A Barnegat, New Jersey.

Q How old are you, sir?

A 36.

Q Do you hold any license issued by the United States Coast Guard?

A Master's license and first class pilot.

Q How long have you held a master's license, approximately?

A I would offhand say 1964.

Q What vessel were you assigned to on April 13, 1972?

A Exxon Connecticut.

Q In what capacity?

A Master.

Q How long have you actually been master of vessels?

A I was made permanent master March 1, 1969.

THE COURT: By the way, I suppose even a judge should know this, but the name Esso and Exxon, for my purposes, is the same, the ship that is called the Esso Connecticut is the one the captain is referring to when he talks of the Exxon Connecticut, is that right?

MR. BOWLES: Yes, your Honor. The names of all the vessels have been changed from Esso to Exxon. I'm afraid we use them interchangeably.

THE COURT: Okay.

Q As master of the Esso Connecticut and other vessels of which you were master, have you had occasion to go alongside ships to receive and deliver petroleum products?

A Numerous times, yes.

Q Have you occasion to go alongside ships at anchor in various ports in Long Island Sound?

A Mainly New Haven.

Q Other than the Amoco Delaware, have you been along-

side a vessel at anchor off Port Jefferson?

A No.

Q While alongside ships to receive or deliver petroleum products, what precautions, if any, do you take to prevent contact between the two vessels?

A Fender.

Q For the Esso Connecticut, is there a usual or standard number of fenders?

A Usually four.

Q How many fenders do you carry on board the vessel or did you carry on April 13, 1972, approximately?

A Total?

Q Yes.

A I'd say we had seven or eight fenders on board.

Q Have you ever had occasions when you were alongside ships where the ships either supplied the fenders themselves or put out fenders?

A Yes.

Q Have you had occasions when you were alongside vessels lightering where the wind and sea built up and the vessels begin rolling?

A Yes.

Q What, if anything, do you do when that occurs?

A Double up on your lines, breast lines, spring

lines, fenders, double up on the fenders.

Q Have you ever had occasion where the mate or officers on board ships have asked you to put out more fenders?

A Not that I recall, no.

Q If that ever occurred, what would you do, if anything?

MR. WALKER: Objection, your Honor. I don't think that has any relevancy. He said it's never happened to him in his experience.

THE COURT: I don't understand how that will be useful, Mr. Bowles. What do you expect to --

MR. BOWLES: I am asking him if an officer or master of a ship he was alongside asked him to put out more fenders, what would he do.

THE COURT: I know you are asking that, but why is it relevant?

MR. BOWLES: To show that the lightering vessel is subject to the orders of the vessel it's alongside.

THE COURT: Do you object to that, Mr. Walker?

MR. WALKER: Yes. I don't think there has been any foundation for that, your Honor.

THE COURT: No, I will allow that.

Q What, if anything, would you do if a master of a

ship you were alongside asked you to put out more fenders or lines?

A Definitely do as he asked.

Q On board the Esso Connecticut on April 13, 1972, did you stand a watch?

A Six to twelve watch, yes.

Q What were your activities during the afternoon of April 13th?

A I had dinner at 1200, turned in approximately 1400, got up at, I would say 1700, which is my normal practice, shaved, and I went up into the wheel house at 1715.

Q Who was in the wheel house when you arrived?

A Mate Swen Bondy.

Q Is there any other licensed officer on board the Esso Connecticut?

A No.

Q It's yourself as master and Mr. Swen Bondy as mate?

A Yes.

Q Did you have occasion to observe the weather conditions and tidal conditions when you went up to the wheel house of the Esso Connecticut at 1715?

A 1715 we were already into the swing where the stern was turning toward Port Jefferson.

Q What were the wind conditions at that time?

A From what I remember, I would say two to three miles per hour.

Q From what direction?

A East southeast.

Q Was there any sea running?

A Yes.

Q Any swell?

A Approximately a three foot swell.

Q Were there any whitecaps on the water?

A No.

Q What were the visibility conditions?

A At 1715?

Q When you got up there, yes, when you went up on the wheel house?

A I can't say for certain whether it was actually zero visibility then or was it setting in, I can't say for certain.

Q Visibility was impaired somewhat?

A Yes, definitely was.

Q You mentioned before that the Amoco Delaware was swinging. What direction was she pointing at that time, do you recall what compass direction, or approximate direction?

A Northwesterly, I would say, about.

Q Were you in a lee of the Amoco Delaware at that

time?

A No.

Q What was happening?

A Coming into the trough of the sea.

Q What, if anything, was the Esso Connecticut doing?

A We put out the remaining fenders that we had.

Q Excuse me. At 1715 was your vessel stationary or rolling?

A No, she was rolling.

Q Heavily, moderately, light?

A Moderate, I'd say.

Q Were the fenders doing their job at that time or not?

A Yes.

Q After you went up to the wheel house or at any time thereafter that evening, did anyone from the Amoco Delaware ask you or your officers or men for more fenders?

A No, not to my knowledge, no.

Q Did they ever criticize you or say anything in criticism to you?

A No.

Q After you went up to the wheel house about 1715, how long did you remain there, approximately?

A 1730 to go down in the mess room to eat and

prepare to go on watch at 1800.

Q Did you have any conversations with your mate Bondy at that time concerning the actions of the Esso Connecticut?

A I mentioned to him that the sea conditions did not look good. My last remark was, before I left the wheel house, was that if it got any worse, to cease operations and leave.

Q Then you went to the galley, is that correct?

A Yes.

Q What occurred next?

A I sat down, I was in the galley I'd say approximately two to three minutes and I went out on deck and she started to roll a bit more, and when I got out on deck I bumped into Captain Jarrett.

Q Who is Captain Jarrett?

A The captain of the Amoco Delaware.

Q Did you have any conversations with him at that time?

A The only thing I said to him, that we can't take any more of this, that we have to get away.

Q What did he do at that time?

A We simultaneously yelled to his crew and to my men to knock it off.

Q What did you do at that time? Did the Amoco Delaware

stop pumping at that time?

A Yes.

Q You have to ask the Amoco Delaware to stop pumping, don't you?

A Oh, yes.

Q Did Captain Jarrett at that time shortly after 1730 when you first saw him, did he say anything to you?

A Not whatsoever.

Q Did he ask you to leave at that time?

A No.

Q How long did it take to disengage and get away?

A We were away at 1745.

Q Between 1715 when you first went up to the wheel house and 1745 when you broke away --

THE COURT: I think he said 1740, did you?

THE WITNESS: 45, I believe it was.

THE COURT: Which did you say, though?

THE WITNESS: 1745.

Q Between the time you went up to the wheel house and the time the vessel broke away, did you see any contact between your vessel and the Amoco Delaware?

A Steel to steel?

Q Yes.

A No.

Q After the Esso Connecticut broke away, what time did you go alongside the Amoco Delaware?

A I laid off until she settled down with the current. I think it was foggy, I kept her on radar. It was either 1835 or 1840, something like that.

Q Did you go back alongside?

A Yes.

Q Did you then continue operations?

A Yes.

Q At what time did you leave the side of the Amoco Delaware?

A I think it was somewhere around 2310.

Q Eleven o'clock that night?

A Somewhere around there, 2300, 2310, 2315.

Q Were there any further rolling during the period after you went back alongside?

A No.

Q Any difficulties in continuing the operation at all after that time?

A None whatsoever, no.

Q If prior to the time the Esso Connecticut left the side of the Amoco Delaware, the master or an officer from the Amoco Delaware asked you to leave or told you to leave, what, if anything, would you have done?

A I would have to leave.

Q After the Esso Connecticut went back alongside the Amoco Delaware, did you have any conversations with Captain Jarrett of the Amoco Delaware?

A To recall the time, I can't recall the time. I went out on deck, it was dark, and he came down the ladder and asked if I was the captain, and we introduced ourselves and he produced a letter and gave me a letter.

Q What was the content of that letter?

A Stating that we came into violent contact with each other and we would be held for any damages sustained by the Amoco Delaware.

Q What was your reaction to that?

A I was dumbfounded.

Q Why?

A Because I figured we left before damage was done.

Q Did Captain Jarrett point out where the alleged damage occurred?

A We walked over the side, yes, and he pointed out an area.

Q Did you have lights on deck at that time?

A Four flood lights.

Q Did you see any damage where Captain Jarrett pointed to?

A I saw none whatsoever. I used my flashlight also. I saw nothing.

THE COURT: Where was he pointing, above the waterline?

THE WITNESS: Yes. I believe it was below the midship house. How many feet below the deck, I can't truthfully come out with a figure and say how many feet it was below deck.

MR. BOWLES: I have no further questions at this time, your Honor.

CROSS EXAMINATION

BY MR. WALKER:

Q Did you make a report of this incident to your boss?

A The mate did, on watch. The mate on watch did.

Q The mate on watch did?

A Yes.

Q Without regard to whether there was metal to metal striking, were there any indentations in the hull of the Amoco Delaware as a result of this incident?

A I saw none.

Q Do you know the basis of this statement appearing in the report filed with the Coast Guard by your operations manager, to the effect that the motion caused indentation to

* * *

figured we were in just about the worst of it then. I didn't expect it to get any worse.

Q Did you look at the swell?

A When?

Q At 1715 when it started rolling.

A I was up in the wheel house, yes.

Q Did you look at the swell, the easterly swell?

A Yes.

Q Did you feel that your vessel was going to start rolling more?

A No, I figured we were capable of sticking it out.

Q Did you feel there was any action necessary by the Amoco Delaware at that time, 1715?

A No, I thought we could stick it out the way it was.

Q You use this expression, "stick it out." I'd just like to refer back to the mate's characterization of what you said when he asked you, when he told you that he thought you should leave, and he said that you said, "We should stick it out a little bit longer." With that in mind, do you recall saying that to the chief mate?

A Not at Port Jefferson, no. There was once I did at New Haven, yes.

Q Were the circumstances in New Haven similar to these,

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AMOCO SHIPPING COMPANY

vs. 74 Civ. 223

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, etc.

February 11, 1975

(Trial resumed)

THE COURT: All right, Mr. Bowles. Let's proceed with that.

S T A N L E Y O. C H R I S T E N S O N, resumed.

CROSS EXAMINATION CONTINUED

BY MR. WALKER:

Q When did you first notice that there was an easterly swell running on April 13th, the day of this incident?

A I'd say when I went up to the wheel house at 1715.

Q How long was the swing of the Amoco Delaware to the tide at that time?

A Like I mentioned yesterday, from what I remember, roughly in a northwesterly heading. The stern was swinging towards Port Jefferson.

Q At that time you didn't see any danger?

A At that particular time we were riding fine. Moderate roll.

Q Were you aware that a three or four foot swell would

cause your vessel to roll dangerously?

A No, I thought she would ride it out nice.

Q Do you agree that the swell at the time you decided to leave the side of the Delaware was about three feet?

A To the best of my recollection I would say it was about three feet, yes.

Q You said the master of the Amoco Delaware came aboard your ship and gave you a letter of protest, is that right?

A Yes. I don't remember the exact time.

Q In other words, he viewed that his ship had been damaged -- I know you didn't, but according to what he told you, he viewed his ship as having been damaged, is that right?

A Yes. That was the gist of the letter.

Q And he alleged that it was damaged as a result of your ship rolling against the starboard side of his ship?

A Yes.

Q And the port side, of course, of your ship, is that right?

A Yes.

Q Did you consider that you had had an accident on April 13, 19 --

A Absolutely not.

* * *

"Q At what time was the decision made to stop pumping?

"A 1731."

A That could very well be.

Q Does that refresh your recollection?

A That could be, yes. Like I say, I came down to the galley at 1730 and I was only there a minute or two minutes or so. Whether it was 31, 32, 33 or 34, I don't know.

Q I believe you testified yesterday that the dangerous rolling or when you thought you had a dangerous situation with respect to rolling was 1730, is that right?

A Like I say again, approximately two minutes after I came into the galley.

Q What time was that again?

A I don't know, I didn't look at the watch whether it was 1731 or 32 or 33. It was between say 1730 and 35, figure.

Q Certainly they didn't stop pumping until they decided it was a dangerous situation, is that correct?

A It was agreed mutually at the same time between Jarrett and myself.

Q That was at 1731?

A Could very well have been 31, yes.

* * *

* * *

further.

REDIRECT EXAMINATION

BY MR. BOWLES:

Q Captain Christenson, Mr. Vukin has been identified as being in the marine department of the company at this time, at the time of the incident. Was he a witness to the accident, to your knowledge?

A Was he on board?

Q Yes.

A No.

Q You gave some testimony yesterday about the fenders breaking loose. Do you have an opinion as to whether those fenders broke loose because of defective fenders or lines or the force of the roll?

A As far as rubber fenders versus the fender that is made out of line, that is knit, with line, line will rub up and down whereas a rubber fender will tend to catch and seize.

Q How does that affect the breaking of the line, if it does?

A You can part your cable that is holding the type of fender they call the pigtail fender.

Q Captain Christenson, after you went out on deck shortly after 1730 or between approximately 1730 and 1735,

will you describe what generally was going on, please, how you disconnect the lines -- excuse me, the cargo hoses, and what operations are necessary to secure them on your deck?

A The ship, the Amoco Delaware's crew connects the hoses from their deck.

Q How many hoses are there?

A Two.

Q How is it disconnected?

A Usually four bolts on each hose.

Q How do you bring those hoses back on board your vessel?

A With a cargo boom.

Q How many booms do you have?

A One boom. Take one hose in at a time, and you have to lay it down and put it in the cradle. Then you raise it up again, send it out to get the next hose.

Q You are referring to the boom?

A Yes.

Q How long did that operation take to disconnect the hoses and bring them safely board your vessel?

A Excluding our letting to the lines?

Q How long did the whole operation take from the time of ordering the pumps stopped on board the Amoco Delaware --

A I'd say ten to twelve minutes.

Q Until you were able to move away, in other words, this operation takes some time to disconnect the hoses and put them on deck?

A Definitely.

Q It's not an instantaneous matter by any means?

A No. In fact, ten to twelve minutes is very fast.

Q Captain Christenson, if the Amoco Delaware had swung in the opposite direction that she did, in other words, if their stern had gone through the north, can you tell us whether or not the Esso Connecticut would have been in the lee of the Amoco Delaware?

A We would have been in her lee, yes.

Q In your opinion, would you have had as much rolling if you had been in the lee as you did here?

A I don't figure we would have experienced any rolling.

Q Will you describe the deck edge of the Esso Connecticut, the point where the side of the Esso Connecticut and her main deck come together? Is that a sharp joint or rounded?

A No, it's rounded.

Q What is the size plate in that vicinity?

A It's half inch plate.

Q You broke away from the side of the Amoco Delaware

* * *

evidence?

* * *

MR. BOWLES: Yes, your Honor.

THE COURT: You are about to fail. I'm not going to receive that.

MR. BOWLES: I have no further questions of the witness.

THE COURT: Do you think any of this testimony should stand? Have you elicited anything that you need in this record from Mr. Stovall?

MR. BOWLES: Not over your Honor's rulings.

THE COURT: I will strike his testimony, so that we will not have any confusion about that. Thank you, Mr. Stovall.

(Witness Excused)

MR. BOWLES: Captain William Wheeler, please.

W I L L I A M W H E E L E R, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOWLES:

Q Captain Wheeler, what is your occupation?

A Presently self-employed here in the port of New York as a marine surveyor and a marine consultant.

Q Do you hold any license issued by the United States

Coast Guard?

A Yes, sir, I do.

Q What license?

A Master, any ocean, any tonnage, since 1945.

Q Did you go to sea?

A Yes, sir, I did.

Q How long?

A From 1935 until 1955 with about two years off for working ashore as a terminal superintendent.

Q During that period of time were you ever the master of a ship?

A Yes, I was.

Q For how long did you act as master?

A For about three to three and a half years as master.

Q In your period of time at sea and particularly when you were master of ships, did you have occasions when your ship was anchored with lighters alongside?

A Yes, sir, I have.

Q Is this a frequent occurrence?

A Yes, it is.

Q Can you tell us whether your ship was on charter at any of those times?

A Yes, sir. I have served as master aboard a chartered

vessel.

Q When lighters were alongside your vessels --

MR. WALKER: Objection, your Honor. Before he gets into the meat of his testimony, I would like some voir dire on the qualifications. The bare statement of lighters, there are all kinds of lighters. I think we should go into this before we get into the substance of his testimony.

MR. BOWLES: I don't believe the type of lighters makes any substantial difference, your Honor. You have all different types of lighters, obviously. Oil barges, freight barges -- there are an innumerable type and number of barges. The questions have to do with seamanship, whether the barge, whatever it is, can be prevented from coming into contact with the side of the ship, what happens --

THE COURT: Do you claim that the kind of lighter makes a difference as to the rules of --

MR. WALKER: Yes, your Honor. I certainly do.

THE COURT: I will just receive it all. You may cross examine, you may put on rebuttal testimony. I don't think it's useful for me to interrupt for a so-called voir dire. I will take it all as a kind of cross examination and see where we come out. All right, Mr. Bowles.

Q On those occasions when you had lighters alongside your vessels --

MR. WALKER: Objection, your Honor. I think we have to characterize what kind of lighter. Self-propelled --

THE COURT: You can cross examine about that.

Q Captain Wheeler, on those occasions when you had lighters alongside, did you have any instances where in your opinion the lighters did not have sufficient fenders or lines?

A Yes, sir.

Q What, if anything, did you do on such occasions?

A On some occasions where we had additional fenders of larger size we installed and used the larger fenders. In other cases where we did not have adequate equipment available we shifted the lighter to a more adequate, a more favorable position to withstand the weather conditions.

Q Did you have occasions to ask for more fenders, from the people on the barge, if they were manned?

MR. WALKER: Objection, your Honor. There is no testimony in this case that anybody complained about the fendering. I mean, all of these questions are directed to the fact that he, Captain Wheeler, during this lightering operation of which he has some knowledge and recollection, involved a case where he didn't believe the fendering was proper. We have got a situation here where everyone was agreed that the fendering was proper, there was no complaint

made, and Mr. Bowles brought that out and we concede this. We never complained about the fenders and I don't see how we can take a situation where he saw fit to complain and saw fit to find that their fendering was inadequate and objectionable, and establish relevancy to the facts of this case.

THE COURT: Mr. Bowles?

MR. BOWLES: Your Honor, Mr. Walker's papers, I believe, are replete with allegations that the fenders were inadequate. Although the witnesses don't say that.

THE COURT: Look, he has just finished saying on the record that there is no such issue in the case. I don't care what's in his papers. That is as explicit and unqualified as it can be. If you want to fight about some issue that you think is in the papers that he has just disclaimed as clearly as he possibly could, I'm not going to let you.

MR. BOWLES: Then there is no need to at that point, your Honor --

THE COURT: If you are agreed, then let's proceed.

MR. BOWLES: We are agreed, your Honor.

Q Did you have any occasions where your ships were at anchor with lightering alongside in places where the ship would be subject to swinging, say, 180 degrees or nearly so

with the change of the tide?

A Yes, sir.

Q On those occasions, did you have any standard procedures with respect to your ship and the lighters alongside?

A Yes, sir.

Q What were they, sir?

A To anticipate well in advance the weather conditions and the change in the weather conditions that the reverse heading will have on your vessel at that particular time. In this case, if I may describe, use this as an example, they had an easterly wind setting into Long Island Sound for sometime that had built up a three to four foot swell setting in a westerly direction. On an ebb tide the vessel would be laying with the tide, but stern to the wind. The sea condition built up would be in effect dampened by the ebb tide. When the ebb tide finished, slack waters, and the flood tide started, the dampening effect would be eliminated and you would expect the sea condition, the swell, to increase both in wave length and in amplitude. Both in wave length and height of swell. With this in mind, you would take a definite action to control the direction in which your ship swung if you had a lighter alongside. The very fact that you have a lighter alongside creates a drag on your vessel. She

will not lay as she would if she were lying by herself to her own anchor. She would lay in this case with her stern directly into the wind. When the slack water occurred, the vessel would ride up with the wind directly over its own anchor chaining, ride directly forward, and when it became restrained by the weight of its own anchor chain, then it would swing, reverse about, and it would take a considerably longer period of time in order to complete its swing. She would tend to lie broadside to the sea for quite an extended period of time.

Q Captain Wheeler, is the direction of the swing always predictable?

A It's not predictable but it can be controlled.

Q How do you mean?

A Meaning that you can't sit around idle and do nothing and be able to predict or say that the ship is going to turn in a given direction. But you can anticipate and take action to control the direction in which the ship turns.

Q What type of action, sir?

A By using rudder, by using your engine, by heaving ahead on the anchor at the slack water when there is no longer any strain on the anchor, to shorten the scope of your chain. And depending on whether the ship is a tide-rode or wind-rode, responding to the wind or responding to the tidal

currents, the actions that you could take would vary.

Q In taking that action, Captain Wheeler, when in period of time would such action be effective, either before the tide actually changes or after the ship commences swinging in one direction or another?

A It depends on what forces you elect to use. If you are going to use your engine and rudder, then it wouldn't be too critical as to what time you applied the forces. If you are just going to use your rudder it would b critical because you want to apply your rudder at the last of the ebb current so the ship is cocked on the right hemisphere in regards to your anchorage periphery so that when the flood tide did start you'd ride up over your anchor and you'd change the swing in the anticipated direction or the desired direction. At the same time during the slack water you would tend to heave in on your anchor. If that is the force that you wanted to use.

Q Have you ever had occasions yourself when you have used your engines or rudder or -

A Oh, yes.

Q Anchor to direct the swing of the ship?

A Yes, I have.

Q Have you ever had occasions where the sea or swells built up to cause heavy rolling between a lighter along-

side your ship?

A Yes, sir. I'd like to explain. In my definition when you are talking about vessel alongside, heavy rolling is not necessarily high degree of rolling. Two degrees could be heavy rolling when vessels are alongside. It depends on the height of each hull, relative height with regard to the hull alongside. And if you have heavy rolling you are going to incur superstructure damage, damage to your superstructure.

Q Referring to the house above the main deck of each vessel?

A That's right.

Q Did you ever have occasions where you broke lighters loose and moved them away from your vessel?

A Yes, sir, I have. They can be moved aft simply to trail them astern on a single, like a tow line in a tide-rode vessel, or you can move them over to the lee side.

Q Is that a matter of judgment as to when exactly to break loose, depending on the weather conditions, et cetera?

A Yes, it is.

MR. BOWLES: I have no further questions at this time, your Honor.

CROSS EXAMINATION

BY MR. WALKER:

* * *

on board and also been called a ballast, is that true?

A That is true. In ballast means she doesn't have a paying cargo on board.

Q And it means she also may have salt water cargo on board?

A Technically, yes.

Q Let's assume there was no salt water cargo aboard, she was empty for all practical purposes.

A Yes.

Q When the Esso Connecticut came alongside, and later at 1730 when the Poling Brothers' barge came alongside, let's assume they were both empty. However, bear in mind that the Esso Connecticut came alongside at 1440, I believe, and the Poling Brothers' barge came alongside at 1730, about three hours later, roughly.

All right.

A May I -

Q I haven't given you a question yet. Do you want to testify w thout a question?

A Not at all. I just want to clearly understand your question.

Q Well, I haven't asked it yet. I just want you to assume those two things, and then I want you to assume further that, and I think you heard the testimony of Captain Christenson,

that he saw nothing untoward about the weather and he did not believe there was any danger of an accident when he reached the bridge at 1715. My question, bearing those things in mind, is, would you demand that the captain of the Amoco Delaware, whose ship never did roll, anticipate the swing and take action to have the ship swing one way as opposed to another?

A Absolutely, he should have.

Q Absolutely --

A Because he had another vessel alongside into which he was pumping his cargo.

Q Is he supposed to know that the Esso Connecticut is going to start rolling?

A In that particular location, in a tidal estuary, you would anticipate the inevitable.

Q The Esso Connecticut master didn't anticipate it and he has far and away more experience than the master of the Amoco Delaware --

THE COURT: I don't want to interrupt, please, but let's just ask him questions.

A He was --

THE COURT: No, you don't have a question. Don't argue with the witness any more, Mr. Walker.

Q Let's assume that when she started the swing she

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THE CLERK: Any objections?

MR. BOWLES: None.

xxx (Plaintiff's Exhibit 3 received in evidence.)

MR. WALKER: I have the report of vessel casualty filed by Amoco interests and dated July 26, 1972.

MR. BOWLES: Objection to receiving it in evidence, your Honor.

THE COURT: If there is an objection, it's sustained at this time.

MR. WALKER: I now offer in evidence the report of Captain Jarrett who was master of the Amoco Delaware at all pertinent times.

MR. BOWLES: Objection, your Honor.

THE COURT: On this non-record at this time we won't receive it, subject to what may happen later.

xxx- (Plaintiff's Exhibit 5 marked for identification.)

MR. WALKER: I have the Coast Guard casualty report filed by the Esso Connecticut and dated August 14, 1972. I offer that.

MR. BOWLES: No objection.

xxx (Plaintiff's Exhibit 6 was received in evidence.)

MR. WALKER: I now offer the tanker voyage charter party dated March 30, 1972, between Amoco Shipping Company and Humble Oil and Refining Company, the defendant

* * *

did suffer some minor damage. 7b refers to other vessel or property, which I assume means the Amoco Delaware.

MR. WALKER: 7b, I'm sorry, your Honor. My glasses weren't quite good enough there. 7b.

(Pause)

MR. BOWLES: Which simply states, your Honor --

THE COURT: I can read it, with trouble. It won't do, Mr. Walker.

MR.BOWLES: I would go further on that point, that Mr. Bondy testified specifically that he could find no damage to the Amoco Delaware. That is at page 23 of his deposition, lines 19 through 23.

THE COURT: Mr. Walker, I must say, there is an obviously essential link in whatever case you were supposed to be making for the admissibility of Plaintiff's Exhibit 8, and I believe the Court has a right to expect that you'd be ready with this, rather than have me sit here while somebody rifles through a deposition to find that link.

MR. WALKER: Your Honor, as your Honor is aware, in light of our application last week, the man who was on the scene is out of the country. He was in Japan and he was detained a week and that was the reason why we requested a one week adjournment of this trial. Unfortunately, he is not available. He would have been perfect for the job of doing

just this. However, I do think that the evidence before the Court, the fact that there was a collision involving the starboard side shell plating of the Amoco Delaware, and the fact that there is a bill and a survey report which sets forth that this was the damage that was done and this was the repairs that were completed following that, and the fact that the chief officer of the Amoco Delaware said that there was damage to the starboard side shell plating of the Amoco Delaware --

THE COURT: He didn't say that, Mr. Walker, in what you showed me.

MR. WALKER: No, I am referring now to Klaveness.

THE COURT: All I said to you that evoked this oration that you are making is that if the chief officer said that and you are here on a Monday morning and it is a vital part of your case as I see it and you would have seen it, it should have been ready, instead of you having to hunt it up now. That's all I said. I am still going to let you hunt it up, within the limits of the Court's schedule and my patience.

MR. WALKER: We will go on to another witness, your Honor. I don't want to delay the Court. I appreciate the fact that this is delaying the Court. However, I believe that the fact that Mr. Bondy said in his accident report, not-

* * *

A The lee side at the time, right.

Q Of the Amoco Delaware?

A Yes. That was the lee side with the wind. And that discussion came up in the depositions.

MR. BOWLES: No further questions, your Honor.

THE COURT: Thank you, Captain.

(Witness Excused)

THE COURT: All right, Mr. Walker.

MR. WALKER: I don't know whether there is any dispute about this. I'd like either to stipulate that the lightering was ordered by Humble or get this into evidence, your Honor, indicating that. Is there any dispute about that?

MR. BOWLES: No, there is no dispute, your Honor, that it was necessary for the Amoco Delaware to lighter off part of her cargo and that the lighters were arranged by Humble.

THE COURT: Okay.

MR. WALKER: That being the case, your Honor, I rest, with the request that I be permitted to call another witness on damages when he is available next week, Mr. Bysarovich.

THE COURT: Mr. Bowles?

MR. BOWLES: I move to dismiss the complaint in

this matter.

THE COURT: What about the request that has just been made?

MR. BOWLES: I ask that it be denied, your Honor. That is part of the motion to dismiss also. There is not one iota of evidence that any --

THE COURT: Let's go slowly, if you will. That request is denied, Mr. Walker. I don't know if you want me to make a long speech about the history of the adjournments in this case at the instance of the plaintiff and over the opposition of the defendant, but I must say your Mr. Bysarovich has been made most notably unavailable for an extensive period of time beyond the fair requirements of imposing both on your adversary and on the Court. We have given you as much delay as we fairly can having in mind the size and character of your client and of your firm, and I don't think the Court should be subjected to this and I don't think the defendant should be subjected to it. So if you don't want to rest now, you want to do something about damages beyond what you have done, you may do that, but I'm not granting your application for a delay to keep this record open for another week. I think there is absolutely no justification for that. Indeed, I do want to point out that the original request for a very lengthy delay of this trial beyond

the time for which I had set it was in your application a delay until February 10th. Then to my astonishment I learned the other day from your colleague that Mr. Bysarovich, because he had more important things to do, wouldn't be around until February 16th, February 16th, and I don't think your opponent or I should be kept around waiting for him until he finds it convenient to come here and testify in his lawsuit. There are more things than that but I think that is enough to say. And I think in my duty to run this court and run this and several hundred other cases, there is a limit which this would exceed on the degree which I am allowed to tolerate postponements and adjournments. I don't know where that leaves you and I appreciate you may have a problem about proving damages on which your case is not imposing as it now stands. I will give you to tomorrow to do something about that if you wish to. But no more. Mr. Bowles?

MR. BOWLES: Your Honor, I would move at this time to dismiss the complaint in its entirety. There has not been one iota of proof on damages and nothing to establish liabilities. There is no basis for this complaint at all.

THE COURT: In the nature of the procedure as we have conducted it, I could not possibly grant that motion at this time, and I won't. I have in mind that there are two depositions I haven't read and other things that I have not

studied with care, so when I deny your motion, as I am now doing, this is not necessarily a mature judgment that your motion will not eventually turn out to have been meritorious, but I'm going to take whatever evidence you have and decide the whole case based on the evidence from both sides. You may proceed, Mr. Bowles.

MR. BOWLES: Yes, your Honor. I call Mr. Stanley Christenson, please.

S T A N L E Y C H R I S T E N S O N, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOWLES:

Q Mr. Christenson, by whom are you employed, sir?

A Exxon Company U.S.A.

Q Where do you live?

A Barnegat, New Jersey.

Q How old are you, sir?

A 36.

Q Do you hold any license issued by the United States Coast Guard?

A Master's license and first class pilot.

Q How long have you held a master's license, approximately?

* * *

* * *

application. It is again denied. Go ahead, Mr. Bowles.

MR. BOWLES: Your Honor, yesterday you asked for citations from federal citations for briefs.

THE COURT: Yes. Why don't you give them to my learned friend there.

MR. BOWLES: Some of the cases are not federally reported. I have included copies of the reports.

THE COURT: Those which are not reported we will find the A.M.C.s for. But in general as I think I said, when you gentlemen appear before me if you would cite to the books that we have, rather than those we don't have.

MR. BOWLES: I apologize for the oversight, your Honor. We normally try to do that.

THE COURT: Okay.

MR. BOWLES: Your Honor, in reviewing some of the exhibits yesterday I noted something which I would like to bring to your attention. May I have Plaintiff's Exhibits 4 and 5 for identification, please.

(Pause)

MR. BOWLES: May I ask Mr. Walker a question, your Honor.

THE COURT: Sure.

MR. BOWLES: Exhibit 4, would you tell us who signed that report, please?

(No response)

MR. BOWLES: The problem is, the signature is indistinct. Just by way of comparison of signatures, I had understood Exhibit 4 to have been signed by Captain Jarrett, who was the master of the Amoco Delaware at the time of the incident. But in looking at Exhibit 5, which has his name and the signature on it, although they are indistinct it appears to me that someone other than Captain Jarrett actually signed Exhibit 4 and this person might be Captain Sturdevant who was I guess part time the master also of the Amoco Delaware.

MR. WALKER: Yes.

MR. BOWLES: That would be a further ground to move to ask your Honor not to admit Exhibit 4. And then your Honor also asked that we at some point brief the question of whether these two reports should be admitted into evidence. We did some brief research on the matter yesterday and if I may, I would like to give your Honor a copy of a case entitled Palmer vs. Hoffmann, in the United States Supreme Court, 1942. This is one of the leading cases on the subject of accident reports as not being admissible as business records, and if I may say, I recall this case from law school. It's a hornbook type issue, and the case is very clear to the subject.

THE COURT: Yes, I read it in law school, too.

MR. BOWLES: May I give your Honor the case?

THE COURT: You might want to let me know whether anything has happened since 1942 that might be of interest on this question.

MR. BOWLES: We have shepardized Palmer vs. Hoffmann. As far as we can tell at this point on brief research, this is still the law on business records. Business records maintained in the business --

THE COURT: Look, I'd like you to finish putting on your evidence. I told you to brief it and I am going to ask you for post trial briefs and I really don't want to stop for conversation. I want you now to proceed to put on the rest of your case.

MR. BOWLES: The purpose of bringing this up was to renew my motion to dismiss on the ground that not one bit of competent evidence has been put in in this matter. If these reports are excluded at this time as we think they should be, there is no evidence in the case at all.

THE COURT: It's denied. Now please go ahead and finish the evidence and let's close this record, and then you can brief and argue to your heart's content. Call your next witness.

MR. BOWLES: Mr. William Oliver, please.

While Mr. Oliver is taking the stand, I would like to ask one thing further. Mr. Kellner's testimony yesterday testified on such things as the requirement for dry docking, the need for tugs and superintendent's expenses. If it is not clear that those items are rejected at this time, then I must go into that with Mr. Oliver. If they have been rejected by the Court, then there is no evidence that I have to rebut. The same question, Mr. Walker in his proposed findings of fact stated his claim for loss of use, etc. There has been no evidence whatsoever put in on loss of use, and if that is withdrawn by Mr. Walker then I don't have to get into those subjects with Mr. Oliver.

THE COURT: Mr. Walker, do you want to be heard?

MR. WALKER: I believe your Honor has ruled, I thought we clarified that earlier this morning, that the exhibit referring to dry dock expenses and tug boats was excluded by your Honor.

THE COURT: Yes.

MR. WALKER: As well as the testimony pertaining to that. I thought we clarified it this morning.

THE COURT: Let me give you such guidance as I can, gentlemen. I am going to rule with all respect to everybody that Mr. Kellner was thoroughly incredible a witness that I can't base any findings on his testimony. You may be

guided by that.

MR. BOWLES: The other claim, though, for four days lost time for the vessel included on page eight of Mr. Walker's proposed findings of fact, there has been no proof offered and I assume that is withdrawn then, am I correct, Mr. Walker?

MR. WALKER: It is not withdrawn because I made an application, his Honor, of course, has denied it and I am guided by that. I said earlier that in view of his Honor's ruling with respect to any application to take the testimony later I will not put on any more testimony with respect to anything, as a matter of fact.

THE COURT: So there is no evidence on that loss of use claim?

MR. WALKER: No, sir, there is not.

THE COURT: That amounts to the same thing.

MR. BOWLES: Then I have nothing to rebut then. I just wanted to clarify that point. We can make it very short with this witness then.

THE COURT: Okay.

W I L L I A M L. O L I V E R, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

"Q When you realized there was a danger, did you do anything to -

"A Yes.

"Q -- to prevent that danger or lessen the danger?

"A Yes.

"Q What did you do?

"A We asked the Esso Connecticut to leave the ship's side."

As I say, that is in evidence, but I just wanted to point it out because the question was raised yesterday with respect to the damage we are claiming was inflicted on the starboard side shell plating of the Amoco Delaware as set forth in Plaintiff's Exhibit 8, I believe it is, yes.

MR. BOWLES: Your Honor, I would simply comment that there is nothing in the matters just read by Mr. Walker that relates in any way to the specific locations of any damage alleged to be done at this time. Mr. Klaveness never said he saw any indentations on the side of the Amoco Delaware. There is no evidence he ever came on to the Esso Connecticut to look at the side of the Esso Delaware. This is the basis for the previous motions, your Honor. There is simply no evidence before you that any damage was caused on this occasion, no competent evidence, certainly, that any

damage was done to the Amoco Delaware.

THE COURT: That sounds fairly likely to me but I am going to let you brief it. I don't want to go back and forth, Mr. Walker. Before we go to that, as this stands now whether the rulings on evidence questions were correct or not, Mr. Bowles, is there any evidence of damage to support your counterclaim?

MR. BOWLES: Your Honor has stricken the portion of the testimony that I put in. Mr. Oliver as a marine expert, I wished to have him testify that the amounts stated on the invoice was correct --

THE COURT: No, look. Just listen to my question, because you are as sharp as any lawyer who appears here, and respond to my question. My errors you can get reviewed elsewhere. But when I ask you a question I want you to answer it. Given the rulings on evidence, I told you, and having in mind what's in and what's not in, is there any evidence in this record of damage to support your counterclaim?

MR. BOWLES: Not in the amount, your Honor.

THE COURT: Not in any amount?

MR. BOWLES: Not in any amount, your Honor.

THE COURT: All right. The counterclaim is dismissed for want of proof of damage. Indeed, I might go

farther and say that the proof of any indentures is thin to the vanishing point on my appraisal of the evidence that I have heard here in that respect. But in any event I put the ruling, the dismissal on the lack of any evidence of measurable damages to the defendant's vessel. I have a feeling that the best advice you could give your respective clients is to forget about this case. That is my hunch, having heard the presentations, but I am going to let you proceed, if that is your judgment, on behalf of your clients, to present full briefs on the several issues that Mr. Walker may think warrant the further investment of time and money by his client. I will invite you on that assumption first to order the transcript, and second, to prepare and file full post-trial briefs covering the issues that you believe are open. Those post-trial briefs should be complete and not incorporate by reference the things you filed heretofore so we can have in one place the positions of the parties as they are now asserted. And that mean I want the briefs to contain full references to the record for any material proposition of fact that you assert. I want citations to legal authority in the form that I have asked about, and while I think it is a forlorn hope for you, Mr. Walker, I invite you to brief the question as to Exhibits 4 and 5 if you think that there is any point in your investing that kind of effort. Both sides will file these

* * *

EXCERPTS OF DEPOSITION TRANSCRIPT OF SVEND BONDE, MATE AND PILOT OF THE m/t ESSO CONNECTICUT (EXHIBIT 1)

* * *

Q Was it a full load?

A As far as I can recollect.

Q It was?

A Yes, I would say so.

Q On what side of the ship were you made fast alongside?

A We was made fast alongside his starboard side, the AMOCO DELAWARE'S starboard side.

Q And the Poling Brothers' ship was made fast along the port side of the AMOCO DELAWARE?

A Port side.

Q Is that right?

A Yes.

Q Do you recall when the Poling Brothers' vessel was made fast alongside the AMOCO DELAWARE?

A Roughly.

Q Roughly when?

A 1700 or maybe a little later. I'd say just before tide change and during tide change.

Q Just before this incident occurred?

A Yes.

Q You don't remember the full name of the Poling Brothers' ship now, do you?

A No.

fact the vessel swings up against it.

Q You mean a little higher than two or three feet?

A Yes.

Q What direction was the swell coming from on the sea?

A Approximately east -- I would say approximately east.

Q Coming from the east?

A Yes, a little bit towards the south, maybe.

Q Have you ever lighten ships similar to the AMOCO DELAWARE?

A Yes.

Q Big tankers?

A Oh, yes.

Q Was there anything different about the AMOCO DELAWARE from these other big tankers you ever lightened before?

A No.

Q Had you ever lightened the AMOCO DELAWARE before?

A Gee, I don't recall that.

Q Okay.

A I have lightered, of course, Amoco ships,

but I don't remember whether I lightered that one or not.

I couldn't answer that.

Q Had you ever lightered Amoco ships before this incident from Port Jefferson, or do you recall?

A No, I don't recall that.

Q Did you fill out a Coast Guard casualty report, which is commonly called a Coast Guard Form 2692?

A No.

Q Did the master?

A Not to my recollection.

Q Did your vessel sustain any damage as a result of this incident?

A I couldn't answer that one either.

Q Did you observe any with your own eyes?

A Well, no.

The lumps and bumps, I cannot answer that, what caused them.

Q Did you observe any damage that was inflicted upon the AMOCO DELAWARE?

A I inspected the AMOCO DELAWARE before we left and I found no damage.

Q Now, I refer you to Plaintiff's Exhibit 2 for identification and ask you if you will read Paragraph 7-B, this paragraph right here (indicating).

* * *

Q Well, let me put it this way, when did you make out this report which is Plaintiff's Exhibit 2?

A I made that out the very same day, I think, or one day, I believe, after that.

t2 Q At that time you thought that there were possible indentures to the AMOCO DELAWARE, didn't you?

A Yes.

MR. GOTIMER: I object, that does not correctly characterize the witness' testimony.

Don't answer until he rephrases the question.

Q At the time that you made out this report, Captain Bonde, didn't you think that there was a possibility that there were indentures to the AMOCO DELAWARE as a result of this casualty?

A I found none.

Q I didn't ask you that, I asked you didn't you believe at the time that you made out this report that there were possible indentures in the hull of the AMOCO DELAWARE, as a result of this incident?

A There could have been, but I didn't find any. I inspected the vessel and I found none.

Q But you did believe that it was possible

that there were some?

A It is always a possibility.

Q You did believe that at the time, did you not?

A Well, yes.

There is things that any man can overlook, but I went along, all along the deck with a straight edge, but it is only a three foot straight edge.

Q When did you go along the deck with a three foot straight edge?

A At 2300.

Q At that time how much cargo had been discharged?

A We were fully loaded.

Q What?

A We were fully loaded.

Q How far up above the water had the AMOCO DELAWARE raised by that time?

A Oh, without 30,000, I would say that she had raised herself -- I couldn't answer that, but I would estimate, approximately, three to four foot.

Q And what about the cargo that the Poling Brothers' vessel took off, would that bring it another three or four foot up?

* * *

about before tide change.

Q I know, I understand that, but the Poling Brothers ship was also alongside when she was swinging?

A Yes.

Q So if the AMOCO DELAWARE had swung through the north instead of through the south with her stern, then the Poling Brothers ship would have been in the trough, is that right?

A Right.

Q And you say that is what caused this heavy rolling, because the ESSO CONNECTICUT was in the heavy trough of the sea during the swing, is that right?

A That is right.

Q Did you know when the tide was going to change?

A Did I know when the tide was going to change?

Q Yes.

A Oh, yes.

Q I mean, you got tables, you know how to work that out?

A Yes, you figure those things out before you go alongside and you sort of plan everything ahead.

Q Right.

This accident wouldn't have occurred then

* * *

Q He was on deck?

A Yes.

Q Where was he on deck?

A Well, he was practically all over, I guess, all around, trying to get lines out that had departed or looking after fenders.

Q And this was the period from 1723 to 1735?

A Yes, roughly.

Q The period when the rolling and the damage took place?

A Yes. When the rolling and damage was sustained, yes.

Q Did you have any conversations with him about this?

A With who?

Q The master of your ship.

A I did.

Q What did he say to you and what did you say to him, when the ship started rolling, your ship started rolling?

A It was my opinion we should leave.

Q And what did he say?

A He thought we could stick it out a little bit longer.

Q And your opinion eventually prevailed, right?

A Well, that is the way it goes.

Q When was it your opinion you should leave, right when it started rolling?

A Well, when you say started rolling -- I mean, that can cover a wide area because you never lay completely still.

Q I know, but rolling so that you thought it was dangerous?

A When I thought a chance of damages would occur, tide changed, when I was sure that she was going to swing the wrong way.

Q That is when you thought you should leave?

A Yes.

Q In other words, Captain, you said here in your report that the EXXON CONNECTICUT was in the trough of the sea from 1720 until she left?

A Yes.

Q Now, about how long before 1720 had the AMOCO DELAWARE started to swing, roughly?

A Well, that is a hard question to answer because I couldn't really answer that, sir.

Q Well, just give me your best estimate?

A It could be five minutes, it could be six,

seven minutes, I don't know.

Q It could be ten minutes?

A At most.

Q Now, during this period from 1720, say, to the time you left the side of the AMOCO DELAWARE, were you always right there on the deck?

A No.

Q You yourself?

A No.

Q Where were you?

A I was in the pilot house.

Q Some of the time?

A All the time.

Q All the time?

A Yes.

Q What were you doing in the pilot house?

A I went up in the pilot house and I started blowing motors.

Q How long does that take, to start both motors?

A I don't know, two or three minutes. Sometimes it is a little longer, you know, pending how the -- it is a hard question to answer.

Q A short time, any way?

A A very short time, yes.

Q How do you start these motors, press a button?

A It is automatic.

Q Press a button?

A Yes. Automatic setup, you press certain buttons.

Q And what were you doing up there once you got the motors started?

A I was standing by, ready to use them if I had to leave.

Q Did you maneuver your ship at all while you were alongside the AMOCO DELAWARE?

A No.

Q So you really didn't use the motors?

A No.

Q Until you used them to leave?

A Until I used them to leave, that is right.

Q Do you have any record or keep any record of when you start the motors up?

A No, we don't keep a record of that.

Q Does the engineer?

A The engineer does, I believe.

Q He has a logbook?

A He has a logbook.

do they?

A I couldn't answer that either.

MR. WALKER: Okay, no further questions, Captain. Thank you.

Do you have anything?

MR. GOTIMER: Yes.

CROSS-EXAMINATION

BY MR. GOTIMER:

Q At the time the EXXON CONNECTICUT made fast to the AMOCO DELAWARE on April 13th, 1972, was there any request from anyone on the AMOCO DELAWARE to use more fenders or put more fenders out than you had out?

A No.

Q Was there any request to increase the number of mooring lines between the two vessels?

A No.

Q Was there any complaint as to the way you moored and the number of fenders you used?

A Not as far as I know. No complaints were made to me.

Q After the AMOCO DELAWARE stopped discharging and disconnected their hoses, how long was it before you brought the hoses back on to the EXXON CONNECTICUT?

A You mean after we disconnected or you mean

after we came back again?

Q The first time that you disconnected the hoses, the first time the AMOCO DELAWARE disconnected the hoses, did you bring them immediately back aboard?

A Immediately back aboard, yes.

Q And how long was that, was it before you were away from the side of the AMOCO DELAWARE?

A Almost immediately, a minute or two.

Q In leaving the side of the AMOCO DELAWARE, did the EXXON CONNECTICUT strike or touch the AMOCO DELAWARE?

A Never.

Q Prior to leaving the side of the AMOCO DELAWARE, did you hear any metal to metal contact between the two vessels?

A No.

MR. WALKER: I object to the form of the question.

Q Is there anything the AMOCO DELAWARE could have done to avoid the situation that developed?

MR. WALKER: I object to the form of the question.

Q What if anything did the personnel aboard the AMOCO DELAWARE do to prevent the two vessels from

scraping?

A Nothing

Q Could they have done anything?

A Yes.

Q What?

MR. WALKER: I object to the form of the question. Go ahead.

Q Answer the question.

MR. WALKER: Go ahead, answer.

A They could have started the engine and drug the vessel around the anchor.

Q After the rolling began, did anyone from the AMOCO DELAWARE say anything to you concerning leaving or using more fenders or lines?

A N , not to my recollection.

There was nothing said to me.

Q Referring to Plaintiff's Exhibit 2 for identification, what prompted you to make the remarks under 7-B that you read for Mr. Walker?

A On 7-B?

Q Yes.

A That is where we had two rubber fenders hanging and all the paint was worn off there, and it was very shiny and it could have been an indenture.

* * *

* * *

A They were the same as at the time of our anchoring.

Q Were there any seas or tide at that time?

MR. WALKER: Objection to the form of the question.

MR. GOTIMER: Let me rephrase the question.

Q At the time the ESSO CONNECTICUT came alongside and made fast, did you consider which side would be the lee side and which side would be the best side to make fast to?

A Yes.

Q Which side did you decide on?

A Starboard side.

Q And whose decision was it as to which side the ESSO CONNECTICUT would dock and make fast?

A The captain's.

Q Did you consider at the time you decided to make the ESSO CONNECTICUT fast to the starboard side that the tide would switch?

A Yes, that was considered.

Q And at that time did you consider that the ESSO CONNECTICUT would be on the lee side after the tide changed?

MR. WALKER: Objection, unless you define

what you mean by lee side; lee side with respect to the tide or lee side with respect to the wind or lee side with respect to the sea.

Q With respect to the wind.

A With respect to the wind, the ESSO CONNECTICUT was not on the lee side.

Q With respect to the tide, was the ESSO CONNECTICUT on the lee side?

A That is correct, on the lee side.

MR. WALKER: Just to make it clear, when you say "tide", do you mean tidal current?

MR. GOTIMER: Tidal current.

A (Continuing) That is correct. She was on the lee side.

Q When the ESSO CONNECTICUT made fast to the AMOCO DELAWARE, did you have any complaints as to the number of fenders that were put out or as to the method which the ESSO CONNECTICUT used in coming alongside and securing her lines?

A I did not complain.

Q Did you consider the mooring satisfactory for the weather conditions at that time?

A At the time she made fast, yes, I would say satisfactory.

Q How many fenders were put out and by whom between the two ships?

A The fenders were on the ESSO CONNECTICUT before her arrival alongside. They had been rigged and probably remained.

Q And how many --

A They remained rigged on each half of the ESSO CONNECTICUT. She is in the trade of going alongside of ships.

Q How many fenders were there?

A Four, as I recall.

Q You considered these four fenders satisfactory at the time the ESSO CONNECTICUT moored alongside the AMOCO DELAWARE?

A Yes.

Q Did the AMOCO DELAWARE put out any fenders?

A No.

Q Was it a normal procedure not to?

A That is correct, it is.

Q Did you have fenders available to put out?

A No.

Q You do not carry fenders on board the vessel?

A No.

Q When did you first notice the AMOCO DELAWARE

swinging with the change in tide?

A I would estimate at approximately 1700.

MR. MURPHY: Would you please repeat that.

THE WITNESS: 1700.

Q Were you on deck the entire time the ESSO CONNECTICUT was lightering from the AMOCO DELAWARE?

A Yes, I was.

Q Had you anticipated before the AMOCO DELAWARE began to swing, which direction the AMOCO DELAWARE was going to swing when the tide changed?

A Yes. It was anticipated that she would swing to port.

Q Which way did the AMOCO DELAWARE swing when the tide began to change?

A She swung her stern to starboard.

Q At the time you first noticed the AMOCO DELAWARE swinging to starboard, as opposed to swinging to port, which is what you had anticipated, what, if anything, did you do?

A Not anything at the time. There wasn't -- not anything.

Q Were you concerned at that time --

A No.

Q Let me finish the question.

Q Were you concerned at that time that the ESSO CONNECTICUT would be on the windward side and subject to the weather?

A She was on the windward side.

Q You say she was on the windward side when she first tied up?

A Yes.

Q The wind was from the southeast, is that correct?

A Yes -- east southeast, excuse me.

Q What was the heading of the AMOCO DELAWARE at anchor when the ESSO CONNECTICUT tied up?

A Checking with the copy of the log book entries, I would know what her heading was. It is not listed in here.

Q Do you have anywhere in your records where you would be able to find out what the heading of the AMOCO DELAWARE was when she first entered?

A The course recorder charts would have to be consulted for that.

MR. GOTIMER: Mr. Walker, do you have the course recorder charts?

MR. WALKER: No.

What was the question?

(Last pending question read.)

MR. GOTIMER: We call for the production of the course recorder charts.

MR. WALKER: Go ahead.

MR. GOTIMER: Off the record.

(Discussion held off the record.)

MR. GOTIMER: Mr. Reporter, please mark this as Defendant's Exhibit A, which is a report by the master of the AMOCO DELAWARE, John C. Jarrett, dated April 14, 1972.

MR. WALKER: Off the record.

(Discussion held off the record.)

(Above-described document herein marked Defendant's Exhibit A for identification, this date.)

Q I show you Defendant's Exhibit A, a report made by Capt. Jarrett of the AMOCO DELAWARE concerning the events here in question.

In Paragraph 1 of that report, Capt. Jarrett says that the ESSO CONNECTICUT moored on the leeward side of the AMOCO DELAWARE. Do you agree or disagree with that statement?

A I agree with it.

Q Leeward and windward refer to wind condi-

* * *

of the AMOCO DELAWARE undocked?

A When you say vessels, you are speaking of both of them? There is no time at which both of them started to roll.

Q At what time did the AMOCO DELAWARE begin to roll?

A Sometime after 5:15

Q At what time did the ESSO CONNECTICUT begin to roll?

A Excuse me. I wasn't following the first question.

MR. GOTIMER: Read back the prior question.

(Whereupon, the following question was read: "At what time did the AMOCO DELAWARE begin to roll?

Answer: Sometime after 5:15."

A Well, we will have to strike that because the AMOCO DELAWARE didn't begin to roll.

Q At what time did the ESSO CONNECTICUT begin to roll?

A Sometime after 5:15.

Q When the ESSO CONNECTICUT began to roll, did you feel there was any danger to the AMOCO DELAWARE?

A When she first started, she wasn't slamming against the DELAWARE's ship side so there was still no

danger; that is, present danger at that time to the DELAWARE.

Q When did you first realize there was a danger to the AMOCO DELAWARE?

A Sometime between 1730 and 1735.

Q When you realized there was a danger, did you do anything to --

A Yes.

Q -- to prevent that danger or lessen the danger?

A Yes.

Q What did you do?

A We asked the ESSO CONNECTICUT to leave the ship's side.

Q Did you personally ask the watch officer of the ESSO CONNECTICUT or the master to leave the side of the AMOCO DELAWARE?

A The captain of the ship did.

Q The captain of your ship?

A Yes.

Q When the captain of the AMOCO DELAWARE asked, who was it, the watch officer or the master of the ESSO CONNECTICUT did he ask to move or to leave the side of the AMOCO DELAWARE?

* * *

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
for the Second Circuit

AMOCO SHIPPING COMPANY,

Plaintiff-Appellant,

- against -

HUMBLE OIL & REFINING COMPANY, et, ano.,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 2nd *day of* July *1975 at* 120 Broadway, N.Y., N.Y.

deponent served the annexed Affidavit *upon*

Kirlin Campbell & Keating

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 2nd
day of July *1975*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA